Supreme Court, U.S.
FILED
AUG 11 2009
OFFICE OF THE CLERK

No. 09-194

IN THE

Supreme Court of the United States

FRANCOISE ANATE GOMIS,

Petitioner,

—v.—

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LUCAS GUTTENTAG
CAROLINE CINCOTTA
AMEICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, California 94111
(415) 343-0770

KELL ENOW
ENOW & ASSOCIATES
2470 Windy Hill Road
Marietta, Georgia 30067
(770) 956-8515

LEE GELERNT
Counsel of Record
STEVEN R. SHAPIRO
AMEICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle Street
Suite 1818
Chicago, Illinois 60604
(312) 660-1613

QUESTION PRESENTED

In the immigration field, Congress has enacted a series of jurisdictional provisions that generally permit the courts to review "questions of law" pursuant to 8 U.S.C. 1252(a)(2)(D), but bar review of most discretionary claims and certain factual findings. The courts of appeals sharply disagree, however, about how to differentiate "questions of law" from unreviewable factual and discretionary claims. The disagreement has led to jurisdictional conflicts in a number of substantive immigration areas. This case arises in the asylum context, where the conflict is especially entrenched and has proven outcome-determinative in hundreds of cases over the past few years. In particular, this case involves the extent to which the courts may review whether aliens have satisfied one of the statutory exceptions permitting the agency to consider a late-filed asylum application. The question presented is:

Did the Fourth Circuit err in holding that petitioner had not presented a question of law within the meaning of 8 U.S.C. 1252(a)(2)(D), where she challenged only the application of the statutory eligibility standards to the facts of her case, and not the underlying facts themselves or any ultimate discretionary authority the agency may possess to deny a late-filed asylum application.

PARTIES TO THE PROCEEDING

Petitioner is Francoise Anate Gomis. Petitioner was also petitioner in the court of appeals, but was respondent before the Immigration Court and Board of Immigration Appeals.

Respondent is the Attorney General of the United States, Eric H. Holder, Jr.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 1

STATEMENT 4

A. Statutory Background. 4

1. The Filing Deadline Provisions 4

2. The Jurisdictional Restrictions. 7

B. Petitioner's Administrative Proceedings. 10

C. The Fourth Circuit's Decision. 15

REASONS FOR GRANTING THE WRIT 19

I. THE FOURTH CIRCUIT ERRED ON A JURISDICTIONAL ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS. 20

A. The Courts Of Appeals Are Divided Over Their Jurisdiction To Review The

Statutory Exceptions To
The Asylum Filing Deadline..... 20

B. The Fourth Circuit's Jurisdictional
Ruling Is Incorrect. 29

II. THIS CASE PRESENTS AN IDEAL
VEHICLE TO RESOLVE THE
IMPORTANT JURISDICTIONAL
ISSUE PRESENTED HERE..... 36

CONCLUSION 38

APPENDIX 1a

Decision of the Court of Appeals for
the Fourth Circuit 1a

Decision of the Board of Immigration
Appeals 28a

Decision of the Immigration Judge 33a

Decision of the Board of Immigration
Appeals Denial of Motion
for Reconsideration 49a

Constitutional and Statutory
Provisions Involved 52a

TABLE OF AUTHORITIES

Cases

Agbor v. Gonzales,
487 F.3d 499 (7th Cir. 2007) 2

Alaka v. Att'y Gen.,
456 F.3d 88 (3d Cir. 2006) 27

Almuhtaseb v. Gonzales,
453 F.3d 743 (6th Cir. 2006) 21, 25, 32

ANA Intern., Inc. v. Way,
393 F.3d 886 (9th Cir. 2004) 28

Arif v. Mukasey,
509 F.3d 677 (5th Cir. 2007) 25

Awuku v. Att'y Gen.,
No. 08-4778, 2009 WL 1741500
(3d Cir. June 22, 2009) (unpublished) 27

Baig v. Holder,
No. 08-4498-ag, 2009 WL 1788612
(2d Cir. June 24, 2009)
(unpublished summary order) 22

Boumediene v. Bush,
128 S.Ct. 2229 (2008) 30

Chacon-Botero v. U.S. Att'y Gen.,
427 F.3d 954 (11th Cir. 2005)
(per curiam). 21, 25

Dhital v. Mukasey,
532 F.3d 1044 (9th Cir. 2008)
(per curiam) 21

Diallo v. Gonzales,
447 F.3d 1274 (10th Cir. 2006) 24

Diego Pedro v. U.S. Att'y Gen.,
No. 08-15978, 2009 WL 1101373
(11th Cir. Apr. 24, 2009)
(unpublished per curiam) 23

El-Khader v. Monica,
366 F.3d 562 (7th Cir. 2004) 28

Fakhry v. Mukasey,
524 F.3d 1057 (9th Cir. 2008) 13, 21

Ferry v. Gonzales,
457 F.3d 1117 (10th Cir. 2006) 21, 25, 36

Franklin v. Massachusetts,
505 U.S. 788 (1992) 35

Gomis v. Holder,
571 F.3d 353 (4th Cir. 2009) 1

Hamid v. Gonzales,
417 F.3d 642 (7th Cir. 2005) 26

Hana v. Gonzales,
503 F.3d 39 (1st Cir. 2007) 21

Hernandez v. Ashcroft,
345 F.3d 824 (9th Cir. 2003) 28

Hongsheng Leng v. Mukasey,
528 F.3d 135 (2d Cir. 2008)
(per curiam) 22

Husyev v. Mukasey,
528 F.3d 1172 (9th Cir. 2008) 21

Ignatova v. Gonzales,
430 F.3d 1209 (8th Cir. 2005) 21, 25, 36

I.N.S. v. Abudu,
485 U.S. 94 (1988) 4, 14

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999) 13

I.N.S. v. Cardoza-Fonseca,
480 U.S. 421 (1987) 4, 14, 37

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) ..... *passim*

Jay v. Boyd,
351 U.S. 345 (1956) 35

Jean v. Gonzales,
435 F.3d 475 (4th Cir. 2006) 23

Jean-Pierre v. Attorney General,
500 F.3d 1315 (11th Cir. 2007) 24

Jilin Pharmaceutical USA, Inc. v. Gonzales,
447 F.3d 196 (3d Cir. 2006) 28

Kamara v. Attorney General,
420 F.3d 202 (3d Cir. 2005) 30

Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) 10

Khan v. Filip,
554 F.3d 681 (7th Cir. 2009) 24, 25

Lovan v. Holder,
--- F.3d ---, 2009 WL 2341822
(8th Cir. Jul. 31, 2009) 26, 27

Lybesha v. Holder,
569 F.3d 877 (8th Cir. 2009) 23, 25

Matsuk v. INS,
247 F.3d 999 (9th Cir. 2001) 27

Mehilli v. Gonzales,
433 F.3d 86 (1st Cir. 2005) 25

Nethagani v. Mukasey,
532 F.3d 150 (2d Cir. 2008) 27

Nguyen v. Mukasey,
522 F.3d 853 (8th Cir. 2008)
(per curiam) 23, 24

Niang v. Gonzales,
492 F.3d 505 (4th Cir. 2007) 25

Novary v. Holder,
313 F. App'x 869 (7th Cir. 2009) 23

Ornelas v. United States,
517 U.S. 690 (1996) 10, 32, 33

Perales-Cumpean v. Gonzales,
429 F.3d 977 (10th Cir. 2005) 28

Perez-Deleon v. Holder,
No. 08-3494, 2009 WL 1474717
(6th Cir. May 27, 2009) (unpublished) 23

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 32

Ramadan v. Gonzales,
479 F.3d 646 (per curiam),
reh'g en banc denied, 504 F.3d 973
(9th Cir. 2007) ..... *passim*

Sinaga v. Holder,
No. 08-9542, 2009 WL 806752
(10th Cir. Mar. 30, 2009)
(unpublished) 23

Singh v. Holder,
No. 08-60289, 2009 WL 1345946
(5th Cir. May 13, 2009)
(unpublished per curiam) 23, 26

Singh v. U.S. Att'y Gen.,
561 F.3d 1275 (11th Cir. 2009) 26

Stepanovic v. Filip,
554 F.3d 673 (7th Cir. 2009) 28

Sukwanputra v. Gonzales,
434 F.3d 627 (3d Cir. 2006) 21, 25, 35

Sutiowijono v. Att'y Gen.,
No. 08-3188, 2009 WL 1459680
(3d Cir. May 27, 2009)
(unpublished per curiam) 23

Thompson v. Keohane,
516 U.S. 99 (1995) 10, 32, 33

Toussaint v. Attorney General,
455 F.3d 409 (3d Cir. 2006) 23, 26, 27

Townsend v. Sain,
372 U.S. 293 (1963),
overruled on other grounds by
Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) 10, 32

Tuiwainikai v. Holder,
No. 05-73295, 2009 WL 1370541
(9th Cir. May 18, 2009)
(unpublished mem.) 23

United States v. Williams,
504 U.S. 36 (1992) 15

United States ex rel. Accardi v. Shaughnessy,
347 U.S. 260 (1954) 35

Usman v. Holder,
566 F.3d 262 (1st Cir. May 22, 2009) 22

Vasile v. Gonzales,
417 F.3d 766 (7th Cir. 2005) 21, 25, 35

Verizon Communications, Inc. v. F.C.C.,
535 U.S. 467 (2002) 15

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 15

Xiao Ji Chen v. U.S. Dep't of Justice,
471 F.3d 315 (2d Cir. 2006) ..... *passim*

Zadvydas v. Davis,
533 U.S. 678 (2001) 7

Zhang v. Gonzales,
457 F.3d 172 (2d Cir. 2006) 4

Zhu v. Gonzales,
493 F.3d 588 (5th Cir. 2007) 21, 25, 32

Constitutional Provisions

Suspension of Habeas Corpus Clause
of the Constitution, Art. I, § 9, Cl. 2. 1

Statutes

8 U.S.C. 1101(a)(42)(A) 4
8 U.S.C. 1155 28
8 U.S.C. 1158 ..... 10, 11
8 U.S.C. 1158(a)(2) 1
8 U.S.C. 1158(a)(2)(B) 5
8 U.S.C. 1158(a)(2)(D) 5, 17
8 U.S.C. 1158(a)(3) 1, 7, 9, 16
8 U.S.C. 1158(b)(1)(A) 4
8 U.S.C. 1182(a)(9)(B)(v) 34
8 U.S.C. 1182(h)(1)(A) 34
8 U.S.C. 1229b(b)(2) 27
8 U.S.C. 1231(b)(3) 11, 13, 14
8 U.S.C. 1252(a)(2)(B) 1
8 U.S.C. 1252(a)(2)(D) ..... *passim*
8 U.S.C. 1252(a)(5) 9

28 U.S.C. 1254(1) 1

28 U.S.C. 2241 8

REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310 ..... *passim*

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-690 7

Regulations

8 C.F.R. 208.4(a)(4) 7

8 C.F.R. 208.4(a)(5) 7

8 C.F.R. 208.4(a)(5)(iv) 5

8 C.F.R. 1208.3 10

8 C.F.R. 1208.4(a)(2) 34

8 C.F.R 1208.4(a)(5) 34

8 C.F.R. 1208.9 10

Legislative History

142 Cong. Rec. S11491-02 (Sept. 27, 1996) 6

142 Cong. Rec. S11838-01 (Sept. 30, 1996) 5, 6

H.R. Rep. No. 109-72
(2005) (Conf. Rep.) 9, 29

Other Authorities

Asylum Officer Basic Training Course –
One-Year Filing Deadline
(Mar. 23, 2009), *available at*
http://www.uscis.gov/files/article/
One-Year-Filing-Deadline.pdf 34

Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133
(2006) 31

United Nations Convention Against
Torture and Other Cruel, Inhuman,
or Degrading Treatment or Punishment
(CAT) 26, 27

PETITION FOR A WRIT OF CERTIORARI

Petitioner Francoise Anate Gomis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[1] is reported as *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009). There were no district court proceedings. The decision and order of the immigration judge (App. 33a), and the decisions of the Board of Immigration Appeals (App. 28a, 49a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 52a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2; and 8 U.S.C. 1158(a)(2), 1158(a)(3), 1252(a)(2)(B), 1252(a)(2)(D).

INTRODUCTION

Petitioner Francoise Anate Gomis is a 31 year-old woman from Senegal who applied for asylum

[1] "App." refers to the appendix attached to this petition.

because she fears that she will be forced – like her sister – to undergo Female Genital Mutilation if she is deported. As one court has described it, Female Genital Mutilation (FGM) is:

> a horrifically brutal procedure in which some or all of the exterior female genitalia is removed. It is usually performed without anesthesia and using unsterile and rudimentary instruments such as razor blades, knives, or broken glass. Because of its profound traumatic effects-including severe pain, shock, urine retention, hemorrhage and infection (potentially leading to death), sexual dysfunction, and infertility-FGM has been roundly condemned by the international community.

Agbor v. Gonzales, 487 F.3d 499, 501 n.2 (7th Cir. 2007) (internal quotation marks omitted).

The immigration judge in Ms. Gomis' case found her testimony credible. The immigration judge also noted the possibility that Ms. Gomis would be subjected to FGM if returned to Senegal. The judge nonetheless denied her asylum application on the ground that it was untimely. The judge recognized that untimely applications can be considered where the applicant demonstrates the existence of "changed" or "extraordinary" circumstances. The judge further acknowledged that there had been post-deadline events in Ms. Gomis' case (including the FGM of her sister). The immigration judge held,

however, that these events did not satisfy the statutory exceptions for late-filed applications – a ruling the Board of Immigration Appeals affirmed in a one-paragraph discussion.

On appeal, the Fourth Circuit did not reach the merits of whether Ms. Gomis satisfied the statutory exceptions for late-filed applications (much less the merits of her asylum claim). Instead, it held that it lacked jurisdiction to review whether Ms. Gomis satisfied one of the statutory exceptions on the facts of her case (*i.e.*, to apply the statutory standards to the historical facts of her case). App. 13a.

The Fourth Circuit's jurisdictional ruling deepens an already-entrenched circuit split on a recurring issue of immense practical importance in the asylum area. App. 12a-13a (acknowledging circuit split on whether the courts of appeals have jurisdiction to review the exceptions to the asylum filing deadline). Congress understood that there would be occasions when asylum seekers legitimately should be excused from the filing deadline and accordingly enacted statutory exceptions to provide the agency with authority to consider late-filed applications. But, in the absence of judicial review, the statutory exceptions have been given an improperly narrow reading by immigration judges and the BIA, in violation of congressional intent.

This case is an ideal vehicle to resolve the conflict. The Fourth Circuit squarely addressed the question, there is no impediment that would prevent

this Court from reaching the issue, and the jurisdictional ruling was outcome-determinative. This case also offers the Court an especially good opportunity to provide jurisdictional guidance beyond the specific issue presented by Ms. Gomis' case. *See Zhang v. Gonzales*, 457 F.3d 172, 180-81 (2d Cir. 2006) (Calabresi, J., *concurring*) (noting the need for this Court's guidance in immigration cases on how to differentiate unreviewable claims from those that involve the "applications of contoured statutory language to a particular set of facts").

STATEMENT

A. Statutory Background.

1. The Filing Deadline Provisions. To qualify for asylum, applicants must show that they cannot return to their home countries because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); 8 U.S.C. 1158(b)(1)(A); 8 U.S.C. 1101(a)(42)(A). The "well-founded fear" standard does not require asylum applicants to demonstrate that persecution is a certainty, or even that it is more likely than not to occur. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 449-50; *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988). Rather, an applicant may establish a well-founded fear even if she "only has a 10% chance" of being persecuted. *Cardoza-Fonseca*, 480 U.S. at 440.

In 1996, for the first time, Congress enacted a filing deadline, requiring asylum seekers to file within one year of arrival in the United States or within a reasonable period of losing lawful status in the United States. 8 U.S.C. 1158(a)(2)(B); 8 U.S.C. 1158(a)(2)(D); 8 C.F.R. 208.4(a)(5)(iv). But, in response to significant controversy over the proposed deadline, Congress also simultaneously enacted two statutory exceptions in the 1996 legislation, for *changed* or *extraordinary* circumstances:

> An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

8 U.S.C. 1158(a)(2)(D). *See* 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch) (explaining that the "changed" and "extraordinary" exceptions were added out of the "concern" that asylum remain "available for those with legitimate claims").

Congress recognized that there would often be legitimate reasons for an alien's failure to submit a timely application and that these exceptions were thus critically important given the life and death

stakes at issue. *See* 142 Cong. Rec. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch) (emphasizing that "the two exceptions" are intended to "provide adequate protections to those with legitimate claims of asylum"). Among the various examples cited by Congress were aliens who legitimately failed to apply within one year but subsequently obtained "more information about likely retribution [they] might face if [they] returned home," 142 Cong. Rec. S11838-01, S11840 (Sept. 30, 1996) (statement of Sen. Hatch), or who learned their "home government may have stepped up its persecution of people of [their] religious faith or political beliefs," 142 Cong. Rec. S11491-02, S11491 (Sept. 27, 1996) (statement of Sen. Hatch).

Congress made clear that these exceptions were to be given a liberal interpretation to ensure that no alien with a genuine claim for asylum would be turned away for failing to apply within the deadline. 142 Cong. Rec. S11838-01, S11839-40 (statement of Sen. Hatch) (stating that the "important exceptions" are meant to "ensur[e] that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies"). *See also id.* (statement of Sen. Abraham) (explaining that the changed circumstances provision covers "a broad range of circumstances" and emphasizing the need for close congressional "attention to how the provision is interpreted" to ensure that the exceptions "provide sufficient protection to aliens with bona fide claims of asylum").

The statutory exceptions have been given further content through regulations. The regulations define the terms "changed circumstances" and "extraordinary circumstances" and provide a non-exclusive list of circumstances that may excuse an untimely filing. 8 C.F.R. 208.4(a)(4), (5) (reprinted at App. 55a-59a).

2. The Jurisdictional Restrictions. The courts of appeals may review claims concerning the asylum filing deadlines, but only to the extent that petitioners are raising constitutional claims or questions of law. That limitation results from the interaction of a 1996 jurisdiction-*stripping* provision and a 2005 jurisdiction-*restoring* provision. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-690; REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 106(a)(1)(A)(iii), 119 Stat. 310.

In 1996, Congress enacted a series of jurisdictional bars that cover a range of immigration decisions and claims. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 311 (2001) (discussing bar applicable to removal orders based on criminal convictions); *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (discussing bar on review of certain discretionary determinations).

The specific jurisdictional bar at issue here is located at 8 U.S.C. 1158(a)(3). It provides that the courts may not "review" claims relating to the asylum filing deadline. Under this bar, the courts of appeals are thus precluded from reviewing all claims

(factual, discretionary and legal) relating to whether the applicant satisfied one of the statutory exceptions for late-filed asylum applications.

In 2005, however, Congress partially restored review when it enacted 8 U.S.C. 1252(a)(2)(D). Section 1252(a)(2)(D) is a generally applicable provision that applies to all of the jurisdictional bars (with exceptions immaterial here) in the Immigration and Nationality Act (INA). It provides that the courts of appeals may exercise jurisdiction over "constitutional claims" and "questions of law" and may do so notwithstanding the INA's existing jurisdictional restrictions (including the bar on reviewing claims related to the asylum filing deadline).

The impetus for Section 1252(a)(2)(D) was this Court's 2001 decision in *St. Cyr*, 533 U.S. 289, which interpreted the 1996 jurisdictional bar applicable to aliens with criminal convictions. The Court held that although the bar eliminated the court of appeals' petition-for-review jurisdiction over St. Cyr's legal claim, it did not eliminate district court habeas review (because it did not specifically mention the repeal of habeas corpus pursuant to 28 U.S.C. 2241). *Id.* at 314. And because the bar did not eliminate habeas corpus as a jurisdictional safety valve, it did not trigger the "substantial constitutional questions" that would have resulted from the complete elimination of review in any court by any means over legal claims. *Id.* at 300. But the Court also made clear that Congress remained free to enact a

substitute for habeas *provided* it was "neither inadequate nor ineffective" in scope. *Id.* at 314 n.38 (citation and internal quotation marks omitted); *see also id.* at 305.

Congress took up the Court's invitation in 2005 and generally eliminated district court habeas review over removal orders, *see, e.g.*, 8 U.S.C. 1252(a)(5), but simultaneously enacted Section 1252(a)(2)(D) to restore the courts of appeals' petition-for-review jurisdiction over constitutional claims and questions of law. By enacting Section 1252(a)(2)(D), Congress thus avoided the constitutional problems that would have been raised by the absence of any forum to raise legal claims. *See* H.R. Rep. No. 109-72, 175 (2005) (Joint House-Senate Conf. Rep.) (expressly referencing *St. Cyr* and acknowledging on several occasions Congress' understanding that it cannot eliminate all review in any forum over legal claims).

In short, as the courts of appeals have uniformly recognized, the jurisdictional question presented in asylum filing cases is whether applicants are raising constitutional claims or questions of law. If they are raising such claims, then the courts of appeals have jurisdiction to review those claims, notwithstanding the jurisdictional bar set forth in 8 U.S.C. 1158(a)(3). The controversy has centered on what types of claims constitute "questions of law" for purposes of Section 1252(a)(2)(D).

More particularly, the courts of appeals uniformly agree that they may review constitutional claims and what they view as *pure* questions of law. Similarly, the courts of appeals uniformly agree that they may not review discretionary claims or pure factual claims – what this Court has called "basic," "primary" or "historical" facts. *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The disagreement concerns whether the courts of appeals may review a claim, like Ms. Gomis', where the underlying facts are accepted and the petitioner is arguing only that, on those facts, she satisfied one of the statutory exceptions – what this Court has variously described as a "mixed" question of law and fact or one involving the "application" of law to fact. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995).

B. Petitioner's Administrative Proceedings.

1. Ms. Gomis came to the United States from Senegal on a visa in 2001, when she was 22 years old. App. 3a, 43a. She worked as a domestic servant, until her lawful status expired in 2003. App. 37a, 43a. In 2005, petitioner affirmatively applied for asylum before an asylum officer, 8 U.S.C. 1158; 8 C.F.R. 1208.3, 1208.9, arguing that she would be persecuted if returned to Senegal. App. 3a. The application was referred to an immigration judge and Ms. Gomis was placed in removal proceedings, charged with being out of status. *Id.*

Ms. Gomis conceded that she was removable based on her expired visa, but renewed her asylum application under 8 U.S.C. 1158. She also applied for other forms of relief based on her fear of returning to Senegal, including withholding of removal under 8 U.S.C. 1231(b)(3).

Ms. Gomis testified that she believed her family and the ethnic group to which they belong would force her to undergo Female Genital Mutilation. App. 38a. Among other things, she noted that both of her father's wives had been subjected to FGM, *id.*, and that her ethnic group believed in the practice of FGM. App. 36a, 38a. Most importantly, Ms. Gomis noted that, in 1999, her parents had arranged a marriage for her with a man in his sixties, and pulled her out of school so that she could undergo FGM and prepare for the marriage. App. 36a. In light of her parents' decision to subject her to FGM, Ms. Gomis went into hiding and, with the help of an uncle who lived in France, eventually obtained a passport and visa to come to the United States. App. 36a-37a.

While Ms. Gomis was in the United States, her uncle made significant efforts to change her parents' minds about forcing her to undergo FGM, traveling to Senegal to discuss the issue with them. App. 37a. Those efforts failed to persuade petitioner's parents to abandon the practice of FGM and, in February 2005, petitioner's parents forced her younger sister (then 15 years old) to undergo FGM against her will. App. 37a-38a; App 4a-5a.

According to medical records, the FGM of petitioner's sister led to "adverse health effects," including loss of blood, infection, and psychological trauma. App. 37a. Her brother went to the police to file a complaint on behalf of their sister, but when he did so, the police told him to return home. App 5a. In June 2005, shortly after learning of her sister's FGM, Ms. Gomis applied for asylum. App. 38a.

The immigration judge found Ms. Gomis "genuinely credible," App. 42a, and stated that she faced "perhaps what even amount[s] to a reasonable possibility" of being subjected to FGM. App. 45a. The immigration judge nonetheless held that petitioner was statutorily ineligible for asylum because her application was untimely. App. 43a-44a.

Ms. Gomis conceded that her application was untimely, but argued that she satisfied the statutory exceptions for late-filed applications. Among other things, she testified that she did not apply for asylum after her lawful status expired in 2003 because she believed her uncle would be able to persuade her parents to stop insisting that she undergo FGM, allowing her to return to Senegal. App. 37a-38a. When she learned that her parents had forced her sister to undergo FGM, however, "she knew that her parents would not change their minds" and she prepared and submitted her asylum application within a few months. App. 38a.

The immigration judge rejected Ms. Gomis' argument, notwithstanding that her sister had been subjected to FGM, the police's failure to respond to a

complaint made by Ms. Gomis' brother, and Senegal's failure to crack down significantly on the practice of FGM. According to the immigration judge, the circumcision of Ms. Gomis' sister merely "confirm[ed] the preexistent risk of persecution [petitioner] claims she had when she arrived" in the United States. App. 44a. The judge thus concluded that Ms. Gomis had not demonstrated changed or extraordinary circumstances. *Compare Fakhry v. Mukasey*, 524 F.3d 1057, 1063 (9th Cir. 2008) (reversing BIA and explaining that "there can be 'changed circumstances' . . . even if the alien always meant to apply for asylum and always feared persecution" of the same sort); *id.* at 1063-64 (stressing that an asylum seeker should not be penalized for applying only after "changed circumstances . . . made her application much stronger" since it would make little sense to interpret the statute to provide a disincentive for aliens to wait to apply until they were certain they would need asylum).

The immigration judge also denied Ms. Gomis' application for withholding of removal under 8 U.S.C. 1231(b)(3). App. 46a. Like asylum, withholding requires aliens to show that they will be persecuted on one of the five specified grounds, but there is no filing deadline and it is mandatory for those who qualify (unlike asylum, which can be denied as a matter of discretion even to those who meet the statutory requirements). *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999).

Critically, however, withholding applicants must meet a far higher burden of proof than asylum applicants – a "more likely than not" standard, rather than the "well-founded fear" standard. *See* 8 U.S.C. 1231(b)(3); *I.N.S. v. Abudu*, 485 U.S. 94, 99 n.3 (1988) (noting that "it is easier to prove well-founded fear of persecution than clear probability of persecution" required for withholding); *Cardoza-Fonseca*, 480 U.S. at 449-50 (stating that the well-founded fear standard permits a grant of asylum to "one who fails to satisfy the strict [withholding] standard").

Applying that heightened standard, the immigration judge concluded that Ms. Gomis had not demonstrated that her chance of being subjected to FGM was "more likely than not" and denied withholding. App. 46a. The judge recognized that Ms. Gomis' sister had been forced to undergo FGM and did not provide any particular reason why Ms. Gomis would be spared that fate. The judge nonetheless concluded – on the basis of general statistics about Senegal – that Ms. Gomis would probably not be subjected to FGM, despite her parents' intentions and the particular evidence about her ethnic group. App. 45a-46a (citing State Department Report stating that FGM is generally practiced "as a puberty initiation rite," "hardly practiced at all" in urban areas, and that "the government has actually prosecuted people for FGM"); *id.* (reasoning that because Ms. Gomis "lived in Dakar" and is "well past the age of puberty," she is less likely to be subjected to FGM). The immigration

judge thus found that she did not meet the strict burden of proof for withholding and denied that relief.

2. The BIA affirmed in a brief per curiam opinion on the basis of the immigration judge's decision. App. 28a-32a. The Board acknowledged that petitioner "may have a subjectively genuine fear of FGM if she is returned to Senegal," but found no error in the immigration judge's decision. App. 30a-31a. In particular, the Board agreed with the immigration judge that the FGM performed on petitioner's sister did not constitute changed circumstances to excuse untimely filing "inasmuch as the entire reason [petitioner] claims to have left Senegal in 2001 was to avoid the threat of FGM." App. 30a.

C. The Fourth Circuit's Decision.

The court of appeals dismissed Ms. Gomis' asylum claim for lack of jurisdiction. App. 10a-13a.[2]

---

[2] In the Fourth Circuit, Ms. Gomis asserted generally that the court had jurisdiction, but did not brief the jurisdictional issues. The Fourth Circuit nonetheless addressed the jurisdictional issues. *See, e.g., Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 530-31 (2002) (noting that "[a]ny issue pressed or passed upon below by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari") (internal quotation marks omitted); *United States v. Williams*, 504 U.S. 36, 41 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

The court also denied Ms. Gomis' withholding claim on the merits. App. 21a.

1. The Fourth Circuit noted that under 8 U.S.C. 1158(a)(3) it was barred from reviewing the asylum filing exceptions, but also recognized that 8 U.S.C. 1252(a)(2)(D) restored its jurisdiction to review constitutional claims and "questions of law." App. 11a-12a. But the court adopted the government's position that a claim challenging the application of the statutory exceptions to the historical facts of a case raised only unreviewable questions. App. 12a. The Court thus dismissed Ms. Gomis' asylum claim on the ground that it challenged only a "*discretionary determination* based on factual circumstances." App. 12a (emphasis by the Fourth Circuit).

Importantly, the Fourth Circuit did not suggest that Ms. Gomis was challenging the underlying historical facts found by the immigration judge or any ultimate discretionary authority the judge may have possessed to deny her application had she satisfied one of the threshold statutory exceptions for filing a late application. Rather, as the court of appeals recognized, she was challenging only whether, on the facts of her case, she satisfied the statutory criteria allowing the agency to consider a late-filed application – *i.*e., whether she

demonstrated changed or extraordinary circumstances. App 10a-11a.[3]

The court of appeals acknowledged that the Ninth Circuit had reached the opposite position and had held that whether an asylum seeker has satisfied one of the statutory filing exceptions is a "mixed question of law and fact" that is reviewable as a question of law under Section 1252(a)(2)(D). App. 13a. But the Fourth Circuit rejected the Ninth Circuit's position. Instead, it joined those courts that have held that, notwithstanding the 2005 enactment of 8 U.S.C. 1252(a)(2)(D), they "continue to lack jurisdiction over the determination whether the alien demonstrated changed or extraordinary circumstances that would excuse an untimely filing." App. 12a.

2. The court of appeals affirmed the denial of petitioner's withholding claim on the merits. App. 21a. The court found that the evidence did not compel the conclusion that Ms. Gomis would "more likely than not" be subjected to FGM if returned to

---

[3] Thus, this case does not present the question of whether the agency has discretion to deny an application as untimely even where the applicant demonstrates the existence of changed or extraordinary circumstances. *See* 8 U.S.C. 1158(a)(2)(D) (stating that the agency "may" consider a late-filed application in cases where the applicant demonstrates changed or extraordinary circumstances). And because the immigration judge did not reach the merits of the asylum application, the case also does not involve the agency's discretion to deny an asylum application even where the alien established a well-founded fear of persecution.

Senegal. Like the immigration judge, the Fourth Circuit stated that FGM was less common in urban areas and among adult women. App. 16a-17a. The court of appeals also stated that Senegal had enacted laws criminalizing the practice of FGM. App. 17a. Accordingly, although the court acknowledged that "there is evidence in the record that tends to support Gomis' claim" that she will be subjected to FGM, it concluded that "[t]he weight of the record evidence, including her age, her education, and the decreased incidence of FGM in Senegal, specifically Dakar" supported the agency's finding. App 17a.

3. Judge Gregory concurred, without comment, in the court's jurisdictional asylum holding, but dissented from the conclusion that Ms. Gomis had not met her burden for withholding of removal. App. 22a. Judge Gregory argued that the immigration judge, the BIA and the court improperly credited general statements in a country report over specific, credible evidence about Ms. Gomis' individual risk of FGM. App. 22a-24a ("Like the IJ and the BIA before it, the majority incorrectly focuses on general statistics without applying the relevant information specific to Gomis' situation."). Judge Gregory noted that FGM was still practiced by Ms. Gomis' ethnic group and family, citing a recent letter from Ms. Gomis' father stating:

> Francoise, I will advise you [in] this last letter very seriously. . . . I am ashamed and humiliated because of what you did to me an [sic] the entire Gomis family.

> You know the gravity on [sic] what you've caused. I guarantee you that you'll not get [sic] from this situation. I think all means will be necessary to bring you back in Senegal, and I mean it. You'll be circumcised and sent into marriage before my death. I will never forgive you, if you don't return to Dakar for the circumcision.

App. 26a. Judge Gregory noted that the "majority seems to accept the IJ's and the BIA's assertion that Gomis' age will save her" despite the "many letters" from her family "indicating that they continued to insist that she be circumcised." App. 24a. In light of this evidence about Ms. Gomis' particular circumstances, Judge Gregory viewed the likelihood of Ms. Gomis being forced to undergo FGM as well over the 50 percent necessary for withholding, and more like "100" percent. App. 22a, 27a. He concluded that to "deny her withholding of removal and send her back to Senegal, to virtually certain circumcision, would be a great miscarriage of justice." App. 27a.

REASONS FOR GRANTING THE WRIT

The Court's review is warranted because of the jurisdictional issue's practical importance to asylum seekers; because eleven circuits have addressed the issue and are divided in result and analysis; and because the Fourth Circuit's decision was erroneous.

Moreover, this case presents the Court with an ideal vehicle to resolve the jurisdictional question presented here, and there is no obstacle that will prevent the Court from reaching the issue. This case also provides the Court with an especially good vehicle to offer guidance on the proper analytical framework for resolving the many other jurisdictional conflicts that currently exist in the immigration area.

I. THE FOURTH CIRCUIT ERRED ON A JURISDICTIONAL ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS.

A. The Courts Of Appeals Are Divided Over Their Jurisdiction To Review The Statutory Exceptions To The Asylum Filing Deadline.

1. Ms. Gomis raises a claim involving the application of law to fact (*i.e.*, a mixed question of law and fact): whether, on the facts of her case, she satisfied one of the statutory exceptions to the filing deadline. With the exception of the D.C. Circuit, every circuit has addressed whether they may review that question. They are divided in a 1-9-1 split. The Ninth Circuit reviews whether asylum seekers have, on the facts of their case, satisfied the statutory exceptions to the deadline; nine circuits (including the Fourth) refuse to review such claims; and the Second Circuit has taken a middle approach.

In *Ramadan v. Gonzales*, 479 F.3d 646 (per curiam), *reh'g en banc denied*, 504 F.3d 973 (9th Cir.

2007), the Ninth Circuit squarely held that it may review whether asylum applicants have, on the facts of their case, satisfied one of the statutory exceptions excusing the filing deadline. And, since *Ramadan*, the Ninth Circuit has consistently reaffirmed and applied that jurisdictional ruling. *See, e.g., Dhital v. Mukasey*, 532 F.3d 1044, 1049-50 (9th Cir. 2008) (per curiam); *Husyev v. Mukasey*, 528 F.3d 1172, 1178-81 (9th Cir. 2008); *Fakhry v. Mukasey*, 524 F.3d 1057, 1062-64 (9th Cir. 2008).

In direct contrast, the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have held that they may not review such claims. *Hana v. Gonzales*, 503 F.3d 39, 42 (1st Cir. 2007); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); App. 13a (decision in this case); *Zhu v. Gonzales*, 493 F.3d 588, 596 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

The Second Circuit has been less categorical. It has held that it may generally review the application of law to fact (mixed questions of law and fact) under 8 U.S.C. 1252(a)(2)(D). *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 329 (2d Cir. 2006). But it has also stated that, in reviewing the asylum filing exceptions, the court must examine the "precise arguments" advanced by petitioners to

determine whether they have raised a reviewable question of law. *Chen*, 471 F.3d at 330; *Hongsheng Leng v. Mukasey*, 528 F.3d 135, 141 (2d Cir. 2008) (per curiam) ("looking to the 'precise arguments of the petition'" to determine whether petitioner's challenge to the agency's changed and extraordinary circumstances determination raises a reviewable question of law) (quoting *Chen*).

There is thus a direct and acknowledged conflict among the courts of appeals on an issue that has arisen in hundreds of cases over the last few years. In the Ninth Circuit, asylum seekers may obtain review of whether they satisfied one of the statutory exceptions for late-filed applications; in the Second Circuit review is a possibility, based on a case-by-case assessment; in the other nine circuits review is unavailable and asylum seekers are deported based solely on the administrative agency's determination that they failed to satisfy the statutory standards.

The split is also entrenched. As the above citations indicate, the lead case in every circuit (other than the Fourth) dates back at least two years. Moreover, each of these other ten circuits has issued multiple decisions over the years reaffirming its position; in fact, every circuit has issued *at least* one decision in the last six months adhering to its now-settled position.[4] At this point, the courts of

---

[4] *See, e.g.*, *Usman v. Holder*, 566 F.3d 262, 268 (1st Cir. May 22, 2009); *Baig v. Holder*, No. 08-4498-ag, 2009 WL 1788612, at *1 (2d Cir. June 24, 2009) (unpublished summary order);

appeals are largely issuing short, unpublished decisions based on their lead decisions. There is thus no realistic prospect that the issue will be resolved through further litigation in the courts of appeals.

2. Moreover, the courts of appeals are divided not only in result, but also in analysis. *First*, the courts of appeals are deeply divided on the threshold question of whether, as a general matter, the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to fact, or is instead limited to pure questions of law. Six circuits (the Second, Third, Fourth, Eighth, Ninth, and Eleventh) have held that the application of law to fact falls within the term "questions of law" and is reviewable under Section 1252(a)(2)(D). *See Ramadan*, 479 F.3d at 650; *Chen*, 471 F.3d at 324-30; *Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006); *Nguyen v. Mukasey*, 522 F.3d 853, 854-55

Sutiowijono v. Att'y Gen., No. 08-3188, 2009 WL 1459680, at *1 (3d Cir. May 27, 2009) (unpublished per curiam); App. 13a (decision in this case; July 9, 2009); *Singh v. Holder*, No. 08-60289, 2009 WL 1345946, at *1 (5th Cir. May 13, 2009) (unpublished per curiam); *Perez-Deleon v. Holder*, No. 08-3494, 2009 WL 1474717, at *4 (6th Cir. May 27, 2009) (unpublished); *Novary v. Holder*, 313 F. App'x 869, 872 (7th Cir. Mar. 3, 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. June 26, 2009); *Tuiwainikai v. Holder*, No. 05-73295, 2009 WL 1370541, at *1-2 (9th Cir. May 18, 2009) (unpublished mem.); *Sinaga v. Holder*, No. 08-9542, 2009 WL 806752, at *2 (10th Cir. Mar. 30, 2009) (unpublished); *Diego Pedro v. U.S. Att'y Gen.*, No. 08-15978, 2009 WL 1101373, at *2 (11th Cir. Apr. 24, 2009) (unpublished per curiam).

(8th Cir. 2008) (per curiam); *Jean-Pierre v. Att'y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007).

In contrast, three circuits (the Sixth, Seventh, and Tenth) have taken a more narrow view of Section 1252(a)(2)(D) and limited the term "questions of law" to "pure" legal claims or narrow questions of "statutory construction." *See Khan v. Filip*, 554 F.3d 681, 687-88 (7th Cir. 2009) (stating that Section 1252(a)(2)(D) does not cover "mixed" questions); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006) (limiting review under Section 1252(a)(2)(D) to "constitutional claims or matters of statutory construction"); *Diallo v. Gonzales*, 447 F.3d 1274, 1282 (10th Cir. 2006) ("in addition to constitutional claims, the REAL ID Act grants us jurisdiction to review a 'narrow category of issues regarding statutory construction'" under Section 1252(a)(2)(D)) (citation omitted).[5]

Second, the courts of appeals are also sharply divided on how to identify a reviewable mixed question of law and fact. Thus, even among those circuits that agree that a mixed question is generally reviewable under Section 1252(a)(2)(D), there is sharp disagreement on whether particular claims present such reviewable mixed questions (as opposed to pure factual or discretionary claims).

---

[5] The First and Fifth Circuits have not yet weighed in on whether the application of law to fact is generally reviewable under Section 1252(a)(2)(D).

Indeed, the eleven circuits to address the jurisdictional question at issue here have adopted no fewer than five different analytical positions: (1) the Ninth Circuit in *Ramadan*, 479 F.3d 646, has held that the type of claim presented by Ms. Gomis is reviewable as a mixed question of law and fact; (2) some courts (the First, Fifth, and Sixth) have held that it is an unreviewable *factual* claim;[6] (3) some courts (the Third and Tenth) have held that it is an unreviewable *discretionary* claim;[7] (4) some (the Fourth, Seventh, and Eighth) have concluded that the claim is unreviewable because it is *both* factual and discretionary;[8] and (5) the Second Circuit in *Chen,* 471 F.3d at 329, has stated that it will proceed on a case-by-case basis.[9]

In short, the courts of appeals have reached conflicting results on the basis of widely divergent

---

[6] *See Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007); *Mehilli v. Gonzales*, 433 F.3d 86, 93 (1st Cir. 2005); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

[7] *See Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006).

[8] *See* App. 13a (decision in this case); *Niang v. Gonzales*, 492 F.3d 505, 510 n.5 (4th Cir. 2007); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005); *Khan v. Filip*, 554 F.3d 681, 689 (7th Cir. 2009); *Lybesha v. Holder*, 569 F.3d 877, 881 (8th Cir. 2009); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005).

[9] The Eleventh Circuit has not provided any rationale. *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (per curiam).

analytical approaches. Moreover, these analytical differences have now been entrenched for several years.

3. These same analytical differences have led to circuit splits in a variety of other substantive immigration areas. As in the asylum filing context, the courts are divided on how to differentiate reviewable mixed questions of law and fact from unreviewable factual and discretionary claims.

In *Hamid v. Gonzales*, for example, the Seventh Circuit held that it lacked jurisdiction to review whether, on the facts of the case, petitioner satisfied the legal standard for relief under the Covention Against Torture (CAT). 417 F.3d 642, 647 (7th Cir. 2005). *See also, e.g., Lovan*, 2009 WL 2341822, at *7 (holding that application of the CAT standard to undisputed facts is "nothing more than a challenge to the agency's factual determinations"); *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1280 (11th Cir. 2009) ("we may not review the administrative fact findings of the IJ or the BIA as to . . . the likelihood that the alien will be tortured if returned to the country in question").

In contrast, the Third Circuit views such claims as reviewable mixed questions of law and fact under Section 1252(a)(2)(D), because they involve the agency's application of the CAT legal standard to undisputed facts. *See Toussaint v. Att'y Gen.*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) ("The question here involves not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate

that it is more likely than not that she will be subject to persecution or torture upon removal to Haiti"); *Awuku v. Att'y Gen.*, No. 08-4778, 2009 WL 1741500 at *1-2 (3d Cir. June 22, 2009) (unpublished) (citing *Toussaint* and stating that the government "is wrong in its repeated assertion that '[t]his Court lacks jurisdiction over any challenge to the finding that [Awuku] failed to establish eligibility for CAT protection,'" rejecting the argument that such a claim involves only a "'factual determination'") (quoting the government's brief).

The courts of appeals are likewise divided in various contexts on how to distinguish between discretionary and non-discretionary claims. For example, the courts of appeals disagree on whether the "particularly serious crime" determination governing eligibility for withholding of removal is discretionary and therefore unreviewable. *Compare, e.g.*, *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (holding that the "particularly serious crime" determination is discretionary and thus unreviewable), *and Lovan v. Holder*, --- F.3d ---, 2009 WL 2341822, at *6 (8th Cir. Jul. 31, 2009) (same), *with Alaka v. Att'y Gen.*, 456 F.3d 88, 100-02 (3d Cir. 2006) (holding that the "particularly serious crime" determination is not discretionary and can be reviewed), *and Nethagani v. Mukasey*, 532 F.3d 150, 154-55 (2d Cir. 2008) (same).

The courts are also divided on whether the phrase "extreme cruelty" in 8 U.S.C. 1229b(b)(2) is

discretionary and therefore unreviewable,[10] and on the nature of visa revocation determinations governed by 8 U.S.C. 1155.[11]

Thus, the conflicting results and analytical approaches taken by the courts of appeals in the asylum context have broad significance, providing an additional reason for this court to provide guidance and uniformity. Indeed, the jurisdictional issues that arise in the asylum filing context cut across a wide swath of immigration law.

---

[10] *Compare, e.g.*, *Stepanovic v. Filip*, 554 F.3d 673, 680 (7th Cir. 2009) (holding that the phrase "extreme cruelty" is inherently discretionary and unreviewable because it requires "a judgment call"), *and Perales-Cumpean v. Gonzales*, 429 F.3d 977, 982 (10th Cir. 2005) (same), *with Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003) (holding that extreme cruelty is not discretionary but instead involves "application of law to factual determinations").

[11] *Compare ANA Intern., Inc. v. Way*, 393 F.3d 886, 893-94 (9th Cir. 2004) (holding that visa revocations are not "purely subjective" because good and sufficient cause is a "meaningful standard"), *with Jilin Pharmaceutical USA, Inc. v. Gonzales*, 447 F.3d 196, 203-04 (3d Cir. 2006) (holding that because the statute states that the Attorney General "may" revoke a visa "at any time" the decision is discretionary), *and El-Khader v. Monica*, 366 F.3d 562, 567 (7th Cir. 2004) (finding that "the discretionary nature of the decision is apparent from the plain language of the statute").

B. The Fourth Circuit's Jurisdictional Ruling Is Incorrect.

The Fourth Circuit's view that Ms. Gomis' claim is discretionary and factual, rather than a reviewable mixed question of law and fact, is wrong and cannot be squared with 8 U.S.C. 1252(a)(2)(D) or this Court's decisions. The reference to "questions of law" in Section 1252(a)(2)(D) applies to both pure legal claims as well as the application of law to fact. Moreover, the application of the statutory filing exceptions to the underlying facts of a case raises a mixed question of law and fact, and not an unreviewable factual claim. Finally, the statutory filing exceptions are not discretionary.

1. Six of the nine circuits to address the issue have correctly held that the term "questions of law" in Section 1252(a)(2)(D) encompasses the application of law to established facts. *See supra* Section I.B.2. Indeed, the 2005 REAL ID Act was not intended to eliminate any review previously available in habeas. The Conference Report specifically states that the "purpose of [new Section 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas." H.R. Rep. No. 109-72, 175 (2005). In fact, the Report expressly contrasts the REAL ID Act provisions with the 1996 jurisdiction-stripping amendments and emphasizes that the Act was not intended to "eliminate judicial review, but simply restores such review to its former settled forum prior to 1996." *Id.* *See Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to

encompass the same types of issues that courts traditionally exercised in habeas review"); *Ramadan*, 479 F.3d at 653-54 (same); *Kamara v. Att'y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005) (finding that scope of review under REAL ID Act "mirrors" scope of habeas review).

And, as this Court has noted, habeas review has traditionally included claims involving both the proper "interpretation" of statutes *and* their "application." *See St. Cyr*, 533 U.S. at 302; *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) (quoting *St. Cyr* for the proposition that traditional habeas review in the executive detention context covered the "application" of the laws). Section 1252(a)(2)(D) must therefore be construed to encompass the application of law to fact. *See Ramadan*, 479 F.3d at 652-54 (relying on legislative history and traditional habeas law to conclude that "the phrase 'questions of law' as it is used in . . . the Real ID Act includes review of the application of statutes and regulations to undisputed historical facts"); *Chen*, 471 F.3d at 326-27 (finding that the "application" of statutes and regulations was traditionally reviewable in habeas); *Kamara*, 420 F.3d at 211 (same).

Given the constitutional concerns that would be triggered, and Congress' clear intent to preserve the traditional scope of habeas review, there is no basis for construing the reference to "questions of law" in Section 1252(a)(2)(D) to exclude claims involving the application of law to fact. *See St. Cyr*,

533 U.S. at 299-300 (finding it "fairly possible" to construe the 1996 jurisdictional provisions to provide review over the alien's retroactivity claim, emphasizing that this interpretation avoided the "serious" Suspension Clause issues that would have been triggered by precluding all review over a claim that was traditionally cognizable in habeas); *Ramadan*, 479 F.3d at 652-54 (construing Section 1252(a)(2)(D) to cover claims involving the application of law to fact, stating that "a narrower interpretation would pose a serious Suspension Clause issue"); *Chen*, 471 F.3d at 326-27 (same); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 139-41 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over claims involving the "application" of legal standards).

2. Furthermore, the application of the asylum filing exceptions to the underlying facts of a case raises a reviewable mixed question of law and fact, and not a factual claim. A mixed question of law and fact is one where:

> the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). *See also Ornelas v. United States*, 517 U.S. 690, 696 (1996) (describing the determination of "whether [the] historical facts . . . amount to reasonable suspicion or to probable cause" as "a mixed question of law and fact"); *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) ("application of the controlling legal standard to the historical facts . . . presents a 'mixed question of law and fact'"); *Townsend*, 372 U.S. at 309 n.6 (distinguishing issues of fact, which "refer to what are termed basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators," from "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations") (citation and internal quotation marks omitted).

Significantly, with the exception of the Ninth Circuit in *Ramadan,* 479 F.3d at 648, the courts of appeals have ignored this Court's decisions differentiating between historical facts and mixed questions of law and fact. *See, e g., Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748 (6th Cir. 2006).

In this case, the immigration judge made a determination that the facts (including Ms. Gomis' sister's forcible circumcision) did not constitute "changed circumstances" material to her application for asylum. The judge thus applied the statutory standards to the historical facts of the case. That is

a mixed question of law and fact. *Ornelas*, 517 U.S. at 696-97.

Review of the filing exceptions is essential to ensure that those provisions are interpreted in a manner consistent with congressional intent. As this Court has noted, judicial scrutiny of an agency's *application* of a legal standard is critical for effective review of the legal standard itself, particularly in contexts where, as here, a substantive standard is given concrete meaning through case-by-case adjudication. Without such review, an agency could effectively eviscerate a statutory standard by consistently announcing the correct legal rule but de facto applying a standard that is more stringent than the one formally announced. *See, e.g.*, *Thompson*, 516 U.S. at 115 (emphasizing "the law declaration aspect" of reviewing the application of law to fact); *Ornelas*, 517 U.S. at 697 (explaining that "the legal rules for probable cause and reasonable suspicion acquire content only through application" and that "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles").

3. Finally, the asylum filing exceptions are not discretionary. As the Ninth Circuit noted in *Ramadan*, 479 F.3d at 655-56, the phrase "to the satisfaction" could not have been intended to signal that the Attorney General has unreviewable discretion because that would render those words redundant in other contexts. Congress included the phrase "to the satisfaction" in other provisions of the

INA where it *also* expressly stated that the "Attorney General has sole discretion." *See Ramadan*, 479 F.3d at 655-56 (citing as examples 8 U.S.C. 1182(h)(1)(A) and 8 U.S.C. 1182(a)(9)(B)(v)). Thus, the words "to the satisfaction of the Attorney General" were not intended to vest the Attorney General with unreviewable discretion over the "changed" or "extraordinary" circumstances determination, but rather, to provide an objective standard of proof.

Indeed, the relevant regulations and the agency's own training manual show that the phrase designates an objective standard of proof. *See* Asylum Officer Basic Training Course – One-Year Filing Deadline (Mar. 23, 2009), *available at* http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf ("The standard of proof to establish changed or extraordinary circumstances is proof to the satisfaction of the Attorney General. This is a lower standard of proof than the 'clear and convincing' standard that is required to establish that the applicant timely filed"). The controlling regulations also make clear that the words "to the satisfaction of the Attorney General" should be understood as an objective *standard of proof*. *See* 8 C.F.R. 1208.4(a)(2); 1208.4(a)(5) (formerly at 208.4). Accordingly, the changed and extraordinary circumstances exceptions are not discretionary.

Moreover, the application of the statutory filing exceptions to the facts of a case is not the kind of determination that is inherently discretionary. *See Ramadan*, 479 F.3d at 656 (review of the

statutory filing exceptions does not call for a discretionary "subjective" determination). As this Court has noted, "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954). *See also, e.g., St. Cyr*, 533 U.S. at 307-08 (describing discretionary decisions as "a matter of grace") (quoting *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956)); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring) (concluding that the Secretary of Commerce's conduct of the census is not committed to agency discretion within the meaning of the APA because "[t]here is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard").

When the BIA determines that an alien has demonstrated changed or extraordinary circumstances it does not simply exercise its conscience or permit filing as an act of grace. Rather, it applies a statutory standard, fleshed out by agency regulations. The circuits that have held that the application of these standards is discretionary have done so in conclusory opinions that do not address the Ninth Circuit's analysis of the statutory structure or this Court's decisions regarding the nature of discretion. *See, e.g., Sukwanputra*, 434 F.3d at 635; *Vasile*, 417 F.3d at

768; *Ignatova*, 430 F.3d at 1214; *Ferry*, 457 F.3d at 1130.

In sum, Section 1252(a)(2)(D) covers the application of law to fact, as six circuits have properly concluded. Furthermore, the Fourth Circuit erred in this case in finding that Ms. Gomis' claim was discretionary and factual, rather than one involving the application of law to fact.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE IMPORTANT JURISDICTIONAL ISSUE PRESENTED HERE.

According to a computerized search, there have been more than 1,000 cases citing to Section 1252(a)(2)(D) since its enactment in 2005. Hundreds of these cases involve the asylum filing deadlines. Given the overall number of decisions involving Section 1252(a)(2)(D), and the momentous stakes at issue in asylum cases, this Court's review is warranted to ensure uniformity.

Ms. Gomis' case squarely presents the issue on which the circuits are in conflict. As noted, the Fourth Circuit did not suggest that Ms. Gomis was challenging the underlying factual findings in her case or any ultimate discretionary authority the immigration judge may have possessed to deny the application had Ms. Gomis satisfied one of the statutory exceptions. Rather, the court of appeals noted that Ms. Gomis was challenging only the application of the statutory exceptions to the facts of

her case – whether on the facts of her case she "demonstrated changed or extraordinary circumstances that would excuse an untimely filing." App. 12a. Thus, as the Fourth Circuit acknowledged, Ms. Gomis' claim would have been reviewable in the Ninth Circuit. App. 13a.

Moreover the jurisdictional issue was outcome-determinative and the issue was squarely addressed by the Fourth Circuit. App. 12a. Nor is there any impediment that would prevent the Court from reaching the issue. And Ms. Gomis' case starkly illustrates the importance of the jurisdictional question, since she would almost assuredly have received asylum had she been permitted to apply. App. 17a (majority opinion) (acknowledging that there is evidence tending to support Ms. Gomis' claim that she will be subjected to FGM but it does not compel the conclusion that it is "more likely than not" to occur); *see Cardoza-Fonseca*, 480 U.S. at 440 (stating that an asylum applicant may establish a well-founded fear even if she "only has a 10% chance" of being persecuted).

In sum, there is an entrenched circuit split on the question of the courts of appeals' jurisdiction to review the statutory exceptions to the asylum filing deadline, and Ms. Gomis' case will permit the court to fully resolve it. This Court's review is thus warranted. An asylum applicant's opportunity to avoid persecution (including being forced to undergo something as horrific as FGM) should not depend on the circuit in which they happen to find themselves.

That is especially true where the issue dividing the circuits is one involving the jurisdiction of the federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

LUCAS GUTTENTAG
CAROLINE CINCOTTA
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, California 94111
(415) 343-0770

Kell Enow
Enow & Associates
2470 Windy Hill Road
Marietta, Georgia 30067
(770) 956-8515

LEE GELERNT
Counsel of Record
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

CHARLES ROTH
National Immigrant Justice Center
208 South LaSalle Street
Suite 1818
Chicago, Illinois 60604
(312) 660-1613

August 2009

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRANCOISE ANATE GOMIS,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

No. 08-1389

On Petition for Review of an Order of the Board of Immigration Appeals.

Argued: March 25, 2009

Decided: July 6, 2009

Before NIEMEYER and GREGORY, Circuit Judges, and Eugene E. SILER, Jr., Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Petition denied by published opinion. Judge Niemeyer wrote the opinion, in which Senior Judge

Siler joined. Judge Gregory wrote a separate opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Kell Enow, ENOW & PATCHA, Silver Spring, Maryland, for Petitioner. Andrew B. Insenga, UNITED STATES DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, D.C., for Respondent. **ON BRIEF:** Gregory G. Katsas, Assistant Attorney General, Civil Division, M. Jocelyn Lopez Wright, Assistant Director, UNITED STATES DEPARTMENT OF JUSTICE, Office of Immigration Litigation, Washington, D.C., for Respondent.

OPINION

NIEMEYER, Circuit Judge:

Francoise Anate Gomis, a native and citizen of Senegal, petitions for review of an order of the Board of Immigration Appeals (BIA) that affirmed the decision of the immigration judge denying her applications for asylum, withholding of removal, and relief under the Convention Against Torture. Gomis contends (1) that even though her asylum application was not filed within the one-year statutory deadline, the BIA erred in finding that she had not demonstrated changed or extraordinary circumstances that excused the delay and (2) that the BIA's finding that it is not more likely than not

that Gomis will be subjected to female genital mutilation if returned to Senegal is not supported by substantial evidence and thus the BIA's denial of withholding of removal is manifestly contrary to law.

For the reasons that follow, we conclude that we lack jurisdiction to review the BIA's determination that Gomis did not meet the changed or extraordinary circumstances exception and that the BIA's findings underlying its denial of withholding of removal are supported by substantial evidence. Accordingly, we deny Gomis' petition for review.

I

Gomis arrived in the United States on January 30, 2001, coming to work as a nonimmigrant domestic servant for an employee of the International Monetary Fund. She was authorized to remain in the United States until April 30, 2003. Over two years later, in June 2005, Gomis filed an application for asylum in which she claimed that she fled Senegal because her family wanted her to undergo female genital mutilation (FGM or circumcision) and participate in an arranged marriage. After the Department of Homeland Security refused to grant Gomis' application, it issued a notice to appear on July 27, 2005, for removal proceedings and referred the matter to an immigration judge. At the hearing before the immigration judge, Gomis admitted removability and renewed her application for asylum, withholding of

removal, and protection under the U.N. Convention Against Torture.

At the hearing before the immigration judge, Gomis testified that she was born in 1978 in Dakar, Senegal, and lived with her family in the outskirts of Dakar. She is single and does not have any children. Gomis and her family are members of the Djola ethnic group, which still practices FGM, and her father, who is a businessman, has two wives, both of whom are circumcised.

Relating her circumstances, Gomis testified that in June 1999, her parents took her from school so that she could undergo FGM and become married to a man in his sixties. In exchange for this marriage commitment, her parents accepted gifts from the man. Because Gomis desired to finish school and retain her independence, she went to the police to report her parents' intentions, but the police told her to return home and try to resolve the problem. When Gomis informed her uncle, who lives in France, of the situation, he tried to persuade her father, unsuccessfully, to allow Gomis to return to school. On her uncle's advice, Gomis obtained a passport and left home in November 2000, initially hiding at a friend's house in Senegal. After Gomis obtained a visa at the embassy, one of her uncle's friends drove her to the airport to leave Senegal. Once in the United States, Gomis worked for an employee of the International Monetary Fund for three years.

While in the United States, Gomis learned that her parents had forced her 15-year-old sister to

undergo FGM before marriage and that when Gomis' brother filed a complaint with the police, he was told to go home.

Gomis gave her opinion that 80 to 100% of the Djola women have undergone FGM and have been forced to marry older men. According to Gomis, when a woman's parents were ready to have her undergo FGM, they would come to her room with other family members when she was asleep and take her away. She noted that some families have FGM performed on their daughters when they are young, while other families wait until just before their daughters' marriage.

She acknowledged, however, that the Senegalese government is against the practice. Yet, families continue the practice of performing FGM because of tradition. Gomis stated that because her family wanted her to undergo FGM, there was nowhere in Senegal she could live without fear of being subjected to it. She stated that her family is widely dispersed throughout Senegal and that the country is small, where everyone knows each other.*

Gomis submitted a letter from her sister dated September 12, 2006, stating that she underwent FGM in February 2005 and that as a result she became infected and still suffers persistent pain.

---

* The population of Senegal is over 12 million people with more than 1 million living in Dakar proper and some 2.5 million living in the Dakar metropolitan area.

According to her sister, Gomis' father is still angry with Gomis and wants her to return home.

In addition, Gomis presented other letters and documents confirming some of her testimony. She submitted her sister's medical file documenting her sister's visit to the doctor with medical complications after the circumcision; an attestation from her uncle stating that he helped Gomis leave Senegal to go to the United States; an attestation from the person who hired Gomis as a domestic servant, claiming that Gomis' uncle arranged for the employment; a letter sent to Gomis from her aunt in Senegal, who stated that her fiance provided a dowry and that all the other women her age have been circumcised; a letter from her mother telling her that she cannot avoid customs, that her fiance is losing patience with her, and that the entire village is laughing at her family; a letter from her father ordering her to return home so that she can be circumcised and marry her fiance; and finally a letter from her uncle stating that he had seen her parents, and they had not changed their minds and continue to want Gomis to undergo the procedure.

The Department of State's report on FGM in Senegal, dated June 1, 2001, which was entered into the record, states that FGM is most common among Muslim groups in the eastern part of the country, but that most Senegalese women have not undergone the procedure and that it is becoming less common due to urbanization and education. The report refers to a study published in 1988, which found that only 20%

of Senegalese women have undergone the procedure and which noted that other estimates place the figure between 5 and 20%. The report related that FGM is hardly practiced in populated urban areas. Regarding Gomis' ethnic group, the Djolas, the report states that rural elements of the Djola group practice FGM as a puberty initiation rite. For all of Senegal, 90% of the women who had undergone the procedure were between two and five years old at the time of the procedure, but for others it was part of a puberty initiation rite.

In 1998, Senegal's president called for the eradication of FGM, and since 1999, there have been programs and seminars to educate the public about it. Many rural villages have issued declarations against the practice. In January 1999, Senegal enacted a law criminalizing FGM with a sentence of one to five years' imprisonment. The report added that there had been no convictions under this law, and, because many of those circumcised were very young, they were not in a position to report violations.

Gomis also included in the record a State Department report on human rights conditions in Senegal, issued in March 2006, which stated that FGM was practiced in thousands of rural villages. It estimated that nearly 100% of the women in the northern Fouta region were FGM victims and that nearly 60-70% of the women in the south and southeast were. The report confirmed that FGM is a criminal offense, carrying a sentence of six months to

five years' imprisonment, and stated that there have been criminal prosecutions under the law. In addition, the report noted that 140 villages have renounced FGM but nonetheless, many people were still practicing it.

In denying Gomis relief, the immigration judge found that Gomis was "genuinely credible" but that Gomis' opinion testimony regarding the prevalence of FGM, both in general and within her ethnic group, was at odds with the State Department reports. The judge allowed that this could be the result of Gomis' lack of knowledge of the actual facts, "rather than an effort to deceive."

The immigration judge also found Gomis' asylum application untimely because it was filed more than one year after she entered the United States and Gomis did not establish changed or extraordinary circumstances warranting an extension of the filing period. Gomis' evidence about her sister's circumcision, on which Gomis relied to prove changed circumstances, merely confirmed the condition Gomis claimed existed when she left Senegal.

The immigration judge further found that Gomis did not meet her burden of establishing that it was more likely than not that she would face FGM if she returned to Senegal. The judge allowed that there was "some small chance, perhaps what even amount[s] to a reasonable possibility" that Gomis will become a victim of the practice, but not a more-likely-than-not chance. The judge found that most

Senegalese women have not undergone the procedure; that the practice is becoming less common in Senegal; and that it is rarely practiced in urban areas. In addition, the judge found that the "mostly rural elements of the Djola" groups who practice FGM do so "as a puberty initiation rite," but Gomis was well past the age of puberty, and she "lived in Dakar, a very large city." The judge noted that FGM is a criminal offense in Senegal and that the government has begun prosecuting people for the offense. Moreover, because Gomis was 28 years old and "relatively well-educated," she "would be better able to relocate in a safe place in Senegal than [would] a younger or less educated" woman. Accordingly, the judge denied Gomis' petition to withhold removal, stating that "based on a totality of the record of evidence in the case I simply cannot conclude that [Gomis] has met her burden of proof of establishing that it is more likely than not she would be subjected to this horrible practice."

With respect to relief under the Convention Against Torture, the immigration judge found that even if FGM constituted torture, it was not more likely than not that Gomis will be subjected to it. And moreover, any risk that Gomis faces from her family is not with the consent or acquiescence of the Senegalese government.

The BIA affirmed the immigration judge's determinations. It agreed that Gomis "failed to meet her burden of establishing that it is objectively more likely than not that she would be subjected to [FGM]

if returned to Senegal." The BIA found that FGM is becoming less common in Senegal and is rare in large urban areas. In addition, it found that FGM is criminalized by the government of Senegal; that there are prosecutions under the law; and that the government has collaborated with groups to educate the public on the inherent dangers of the practice. The BIA also found that 90% of the women who undergo FGM in Senegal are between the ages of two and five. Because Gomis was 28 years old, she might have a subjective fear of undergoing FGM upon returning to Senegal, but the BIA found that the record does not objectively support that it is more likely than not that she would have to undergo the procedure. The BIA thus upheld the denial of withholding of removal. And finally, the BIA upheld the denial of relief under the Convention Against Torture.

From the BIA's order, Gomis petitions this court for review.

II

Gomis contends first that even though she did not file her application for asylum within one year of the date of her arrival in the United States, as required by 8 U.S.C. § 1158(a)(2)(B), "she meets both the extraordinary circumstances and changed circumstances exception[s]" of 8 U.S.C. § 1158(a)(2)(D). Gomis claims that she did not file within one year because she believed that with the passage of criminal laws prohibiting FGM in Senegal, the practice would change. She argues that

when her sister had the procedure performed on her in 2005 and the police failed to respond, she realized she was in danger of FGM if she returned to Senegal.

The immigration judge found that the FGM performed on Gomis' sister in February 2005 did not constitute either extraordinary or changed circumstances under 8 U.S.C. § 1158(a)(2)(D) because the threat of FGM was the very reason Gomis claims to have left Senegal in 2001, and the BIA "[found] no error in the Immigration Judge's decision for the reasons stated therein."

An alien applying for asylum must show "by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. § 1158(a)(2)(B). An asylum application may be considered after one year "if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified." *Id.* § 1158(a)(2)(D). But 8 U.S.C. § 1158(a)(3) provides that "[n]o court shall have jurisdiction to review *any* determination of the Attorney General under paragraph (2)," which includes both the Attorney General's decision whether an alien has complied with the one-year time limit *and* whether there are changed or extraordinary circumstances excusing the delay. *Id.* § 1158(a)(3) (emphasis added).

Thus, under the express language of § 1158(a)(3), we lack jurisdiction to review the immigration judge's determination. *See Zaidi v. Ashcroft*, 377 F.3d 678, 680-81 (7th Cir. 2004) (holding that the jurisdiction-stripping provision of 8 U.S.C. § 1158(a)(3) precludes review of the immigration judge's determination that the alien had not demonstrated "changed circumstances" or "extraordinary circumstances" under 8 U.S.C. § 1158(a)(2)(D) and collecting cases).

Although 8 U.S.C. § 1252(a)(2)(D), added by the REAL ID Act of 2005, provides that "[n]othing . . . in any other provision of this chapter . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law," the question whether the changed or extraordinary circumstances exception applies to excuse an alien's delay in filing her asylum application is a *discretionary determination* based on factual circumstances. Therefore, absent a colorable constitutional claim or question of law, our review of the issue is not authorized by § 1252(a)(2)(D). Nearly every circuit that has analyzed § 1158(a)(3) in light of § 1252(a)(2)(D) has held that even after the REAL ID Act, the federal courts continue to lack jurisdiction over the determination whether the alien demonstrated changed or extraordinary circumstances that would excuse an untimely filing. *See, e.g., Jarbough v. Attorney Gen.*, 483 F.3d 184, 188-90 (3d Cir. 2007); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Almuhtaseb v. Gonzales*, 453 F.3d 743, 747-48 (6th Cir. 2006); *Chen v. U.S.*

Dep't of Justice, 434 F.3d 144, 154-55 (2d Cir. 2006); *Mehilli v. Gonzales*, 433 F.3d 86, 92-94 (1st Cir. 2005); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005); *Chacon-Botero v. U.S. Attorney Gen.*, 427 F.3d 954, 956-57 (11th Cir. 2005) (per curiam); *Vasile v. Gonzales*, 417 F.3d 766, 768-69 (7th Cir. 2005). *But see Ramadan v. Gonzales*, 479 F.3d 646, 649-54 (9th Cir. 2007) (per curiam) (finding jurisdiction to review whether an alien has demonstrated "changed circumstances" to excuse a late asylum application, characterizing the issue as a mixed question of law and fact).

We join the majority of courts who have reached this issue and hold that we lack jurisdiction to review the immigration judge's discretionary determination, as affirmed by the BIA, that Gomis had not demonstrated changed or extraordinary circumstances to excuse her untimely filing.

III

Gomis also contends that the BIA's finding that it is not more likely than not that Gomis will be subjected to FGM if she is returned to Senegal "is speculative and not based on the substantial evidence in the record." She argues that there "is clear evidence in the record that she will be excised if she were to return to Senegal" and therefore that the BIA's denial of withholding of removal is manifestly contrary to law.

Withholding of removal is available under 8 U.S.C. § 1231(b)(3) if the alien shows that it is more

likely than not that her life or freedom would be threatened in the country of removal because of her "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(2); *see also Haoua v. Gonzales*, 472 F.3d 227, 232 (4th Cir. 2007). The alien bears the burden of demonstrating that her life or freedom would be threatened on account of a protected ground. *See* 8 C.F.R. § 208.16(b)(2). Because withholding of removal is mandatory if the alien meets the standard of proof, *see INS v. Stevic*, 467 U.S. 407, 426, 429-30 (1984); *Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004), the alien must meet a higher standard for withholding of removal than for asylum. *See Camara*, 378 F.3d at 367.

On review, we afford the BIA's determination of eligibility for withholding of removal a high degree of deference. In fact, "a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law." 8 U.S.C. § 1252(b)(4)(C). We review the administrative findings of fact under the substantial evidence standard, *see INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992), and these "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); *see Gandziami-Mickhou v. Gonzales*, 445 F.3d 351, 354 (4th Cir. 2006) ("[T]he substantial evidence test for review of the BIA's conclusions mandates affirmance if the evidence is not 'so compelling that no reasonable factfinder could' agree

with the BIA's factual conclusions." (quoting *Huaman-Cornelio v. BIA*, 979 F.2d 995, 999 (4th Cir. 1992))). Even "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Gonahasa v. INS*, 181 F.3d 538, 541 (4th Cir. 1999) (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)) (internal quotation marks omitted).

Where the BIA adopts and supplements the immigration judge's decision, "the factual findings and reasoning contained in both decisions are subject to judicial review." *Anim v. Mukasey*, 535 F.3d 243, 252 (4th Cir. 2008) (quoting *Niang v. Gonzales*, 492 F.3d 505, 511 n.8 (4th Cir. 2007)) (internal quotation marks omitted).

The immigration judge denied Gomis' application for withholding of removal, finding that "there is some small chance, perhaps what even amounts to a reasonable *possibility*, given her parents['] interest and desire in having her undergo FGM, that she would be subjected to this practice," but that "*it is not . . . anything close to a more likely than not chance*." (Emphasis added). The judge detailed the evidence in the record that supported his finding. On appeal, the BIA likewise determined that Gomis failed to demonstrate a clear probability that she would be forced to undergo FGM and found no clear error in the immigration judge's factual findings. The BIA stated that "while people continue to practice FGM in Senegal in the rural areas, the

practice of FGM is growing less common and is rare in large urban areas, and the government of Senegal has enacted laws criminalizing the practice." It noted that "[t]he record reflects that the government has prosecuted those caught engaging in the practice of FGM and has fought to end the practice by collaborating with other groups to educate people about the inherent dangers," emphasizing that "140 villages renounced the use of FGM." "Further, the record reflects that FGM is hardly practiced in the most heavily populated urban areas such as that where respondent is from and that 90 percent of the females who undergo FGM are between 2 and 5 years of age." Thus, the BIA concluded: "we acknowledge that the 28-year-old respondent may have a subjectively genuine fear of FGM if she is returned to Senegal; however, we agree that she has failed to meet her burden of establishing that it is objectively more likely than not that she would be subjected to the procedure if returned to Senegal."

Because substantial evidence supports the immigration judge and BIA's findings, we affirm the denial of Gomis' application for withholding of removal because a reasonable adjudicator would not be *compelled* to conclude to the contrary. *See* 8 U.S.C. § 1252(b)(4)(B). The record shows that the incidence of FGM in Senegal is low and that the practice hardly occurs in urban areas, such as Dakar. Further, most women have *not* been forced to undergo FGM, and the incidence of FGM is decreasing. Gomis, as an adult, is even less likely to be forced to undergo FGM because 90% of the women

who undergo the procedure are between two and five years old at the time of the procedure. In addition, both practicing FGM and ordering FGM to be carried out on a third party are crimes, and prosecutors now bring criminal charges against perpetrators. Gomis was 29 years old when the BIA dismissed her appeal, and her family lives in Dakar. She is relatively well educated, especially in a country where the adult illiteracy rate approaches 40%, having had 12 years of schooling. The weight of the record evidence, including her age, her education, and the decreased incidence of FGM in Senegal, specifically in Dakar, supports the immigration judge and BIA's finding that it is not more likely than not that Gomis will face persecution.

Although there is evidence in the record that tends to support Gomis' claim that if she returns to Senegal, she will face a risk of FGM, we do not find that "any reasonable adjudicator would be compelled to conclude" that she would, more likely than not, be subjected to FGM. *See* 8 U.S.C. § 1252(b)(4)(B). The agency's finding is supported by substantial evidence, and even if this court would be inclined to decide differently in the first instance, it must affirm under the deferential standard of review. *See Niang*, 492 F.3d at 511 ("[W]here the 'record . . . plausibly could support two results: the one the IJ chose and the one [the petitioner] advances,' reversal is only appropriate where the court 'find[s] that the evidence not only supports [the opposite] conclusion, but *compels* it.'" (quoting *Balogun v. Ashcroft*, 374 F.3d 492 (7th Cir. 2004) (alterations in original));

Gonahasa, 181 F.3d at 541 ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." (alteration in original) (citation and internal quotation marks omitted)).

Gomis argues that this court's decision in *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007), entitles her to relief. In *Haoua*, the alien, a native and citizen of Niger, petitioned for review of the BIA's affirmance of the immigration judge's denial of her application for asylum, withholding of removal, and relief under the Convention Against Torture. While the alien, Mahaman Haoua, was living in the United States, her parents arranged for her to marry the elderly chieftain of a neighboring village, accepted a large dowry as consideration for the wedding promise, and conducted the wedding in her absence. *Haoua*, 472 F.3d at 229-30. In accordance with the customs of the ethnic group of which Haoua was a member, her parents planned on subjecting her to FGM before she joined her husband's household. *Id.* The evidence adduced at Haoua's hearing showed that one in five Nigerian women undergo FGM and that certain ethnic groups still practice FGM despite a new law criminalizing it. *Id.* at 230. Haoua testified that her ethnic group continues to practice FGM, requiring the procedure be performed before a woman marries, and that the Nigerian government's efforts to suppress FGM have been ineffective in rural Nigeria, where her family resides. *Id.* The immigration judge found that Haoua

had "at least a 10 percent chance" of undergoing FGM if she returned to her family in Niger. *Id.* The immigration judge also found, however, that Haoua could relocate within Niger, concluding that her "reasonably available internal relocation alternative overcomes the 10 percent fear of FGM at the hands of her family." *Id.* at 231. On that basis, the immigration judge denied Haoua's application for asylum, withholding of removal, and relief under the Convention Against Torture. *Id.* The BIA affirmed the immigration judge without opinion.

On appeal, we held that "the 10% finding was not supported by substantial evidence," *id.* at 232, noting that the 10% finding "was necessarily premised on speculation and conjecture, in that there was no evidentiary basis for it." *Id.* We placed considerable importance on the fact that "the Attorney General conceded this very point during oral argument, acknowledging that, contrary to the [immigration judge's] finding, if [Haoua] returned to her family, her likelihood of suffering FGM would approach 100%." *Id.* Even though the immigration judge had found that Haoua could relocate in Niger to avoid FGM, which was an alternative basis for denying her application for asylum, "the [immigration judge]'s finding regarding relocation was *specifically predicated on the 10% finding*" inasmuch as he found that Haoua's "reasonably available internal relocation alternative *overcomes* the 10 percent fear of FGM at the hands of her family." *Id.* (first emphasis added). We found it problematic that the immigration judge did not

consider whether Haoua's relocation alternative could overcome a risk of FGM that was *greater than* 10%, in light of both the immigration judge's finding that she had "*at least* a 10 percent chance" of undergoing FGM if she returned to Niger and the government's concession on appeal that the risk approached 100%. *Id.* at 232-33. Accordingly, we vacated the immigration judge's order denying her applications for asylum and withholding of removal and remanded the case to the BIA for further proceedings. *Id.* at 233.

Although there are factual similarities between *Haoua* and the case before us, the case before us is distinguishable inasmuch as there *is* substantial evidence to support the agency's finding that it is not more likely than not that Gomis will be subjected to FGM. In *Haoua*, we held that the 10% finding, on which the immigration judge based his conclusion, was speculative and not based on substantial evidence in the record, particularly in light of the government's concession at oral argument that her risk approached 100%. Here, the immigration judge's findings that there is "some small chance" that she will undergo FGM, but that "it is not . . . anything close to a more likely than not chance," findings which were affirmed by the BIA, are supported by substantial evidence in the record. This finding, quite unlike the 10% finding, is not mere speculation or conjecture. As discussed above, the evidence in this record shows that the incidence of FGM in Senegal is low; that 90% of the victims of FGM in Senegal are between two and five years of

age at the time of the procedure; that FGM is hardly practiced in urban areas like Dakar; and that the criminal law forbidding FGM is enforced. By contrast, Gomis is an adult, she is relatively well educated in light of her 12 years of schooling, and her family lives in Dakar.

Because the BIA's determination in this case is not manifestly contrary to law and its finding that there is not a more-likely-than-not chance that Gomis will be subjected to FGM is supported by substantial evidence, we affirm its decision to deny Gomis' application for withholding of removal.

Having rejected Gomis' arguments, we deny her petition for review and affirm the BIA's order.

PETITION DENIED

GREGORY, Circuit Judge, concurring in part and dissenting in part:

Although the majority fairly characterized the facts in this case, it errs in attempting to distinguish an indistinguishable case: *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007). In *Haoua*, this Court found that substantial evidence did not support the IJ's and the BIA's finding that if petitioner were sent back to her country she would have a ten percent likelihood of facing FGM. Like Gomis, the petitioner in *Haoua* received great pressure from her family to marry a man who had paid a dowry for her and expected her to be circumcised. As in the case at bar, Haoua's future husband was growing impatient waiting for her return. Haoua, like Gomis, was an

adult woman who was well past puberty. In fact, Haoua, at forty years of age, was substantially older than Gomis. The only distinguishable fact in *Haoua* was that the Attorney General conceded at oral argument that if returned to her country, the likelihood of the petitioner suffering FGM would approach 100%. Although there is no such concession here, Gomis presents a mountain of evidence that clearly demonstrates that the likelihood of her being forced to undergo FGM is certainly 100%. Unfortunately, the majority repeats the erroneous analysis of the IJ and BIA in denying Gomis's petition for withholding of removal. I respectfully dissent from this portion of the opinion, but concur in the majority's judgment as to the remaining issues.

I.

Like the IJ and the BIA before it, the majority incorrectly focuses on general statistics without applying the relevant information specific to Gomis's situation.[1] While the State Department's report finds

---

[1] We would be remiss if we discussed in distant legalese the underlying act, which can only be fully appreciated in plain language:

> Female genital mutilation, commonly called FGM, is the designation generally given to a class of surgical procedures involving the removal of some or all of the external genitalia performed primarily on girls and young women in Africa and Asia. Often performed under unsanitary conditions with highly rudimentary instruments, FGM is extremely painful, permanently disfigures the female genitalia, [and] exposes the girl or woman to the

that only 20% of Senegalese women have undergone FGM and that 90% of the women who had undergone the procedure were between the ages of two and five, this does not contradict Gomis's testimony that 80% to 100% of women in *her specific ethnic group* have undergone FGM either as a puberty rite or just before they were married. As the majority points out, Senegal has a population of over 12 million people.[2] If we estimate that half of the population is female, then at least 1.2 million women have undergone FGM in Senegal and 120,000 of those women were over the age of five when they underwent the procedure. Senegal is made up of a wide variety of ethnic groups. Gomis's ethnic group is one of the smaller ethnic groups,[3] which makes her testimony—that a large percentage of a small percentage of the

---

> risk of serious, potentially life-threatening complications, including bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. FGM can result in the permanent loss of genital sensation in the victim and can adversely affect sexual function.

Haoua, 472 F.3d at 228 n.5 (internal citation and quotations omitted). Where there is such a threat of permanent harm—a harm that also includes Gomis's real fear of exposure to HIV/AIDS—there is no room for error or speculation.

[2] The population is currently closer to 14 million, yet for the purpose of this dissent I will use the figures asserted by the majority, which likely refer to the period of Gomis's petition. *See* https://www.cia.gov/library/publications/the-world-factbook/geos/sg.html (last visited May 22, 2009).

[3] Gomis's ethnic group represents only 3.7% of the population of Senegal. (*Id.*)

population practices circumcision—even more compatible with the State Department's report. The IJ found Gomis to be credible but discredited her testimony because of a nonexistent conflict between her stated percentages and those in the State Department's report.

The majority seems to accept the IJ's and the BIA's assertion that Gomis's age will save her from circumcision, despite the fact that her family sent her many letters while she was in her twenties indicating that they continued to insist that she be circumcised. It is clear that Gomis's age will provide no protection. Further, the logic that her urban upbringing will protect her is also fallacious. Considering that her ethnic group is largely from rural areas, her family likely adheres to deep-rooted cultural practices that exist outside of her immediate family's urban location.

The majority emphasizes that "[t]he BIA stated that 'while people continue to practice FGM in Senegal in rural areas, the practice of FGM is growing less common and is rare in large urban areas, and the government of Senegal has enacted laws criminalizing the practice.'" (Maj. Op. 12.) Yet, the IJ, who found Gomis credible, heard testimony that both Gomis and her brother attempted to report her parents to the authorities for their practice of FGM, and their urban area police told them that it was beyond their jurisdiction, as FGM is a family affair. This testimony is not surprising. The State Department's report, which the IJ relied upon, stated

that although Senegal banned FGM in 1999, since the passage of the law there have been no convictions. The report provides that "although the government has been active in seeking to eradicate the practice, we are unaware of any protection in place that might help a woman who wished to avoid it." (J.A. 225.) Additionally, the report mentions that a family was arrested for forcing a five-year-old child to undergo FGM; however, "the cases were not pursued and no convictions resulted" because of an "emotional public outcry" against the criminalization of such practices. (*Id.*)

It was unreasonable for the IJ to rely on the portion of the country report that says that FGM is outlawed in a country and ignore the other evidence from the report, and elsewhere, that the country in question is not enforcing such laws. *See Agbor v. Gonzales*, 487 F.3d 499, 504 (7th Cir. 2007) (finding that despite the fact that Cameroon officially opposed FGM and publicly endorsed the efforts of NGO to end the practice, the BIA could not "simply seize on a few 'flowery bromides' of governmental concern over human rights violations when the remainder of the report describes incidents of persecution consistent with a petitioner's claim." (internal citation omitted)). Gomis has put forth a substantial amount of evidence that the Senegalese police will not help protect her from FGM despite the illegality of the practice in Senegal. Therefore, the record before this Court indicates not only that Gomis will more likely than not be forcibly circumcised, but also that she

will have little recourse or hope of bringing her assailants to justice.

Next, although the majority notes that Gomis offered a letter from her father, the majority appears to miss the grave circumstances she will face should she return to Senegal. The certainty of her persecution is made clear in her father's letter dated September 20, 2006, where he wrote:

> Francoise, I will advise you [in] this last letter very seriously. . . . I am ashamed and humiliated because of what you did to me an [sic] the entire Gomis family. You know the gravity on [sic] what you've caused. I guarantee you that you'll not get from this situation. I think all means will be necessary to bring you back in Senegal, and I mean it. You'll be circumcised and sent into marriage before my death. I will never forgive you, if you don't return to Dakar for the circumcision.

(J.A. 98.) It is difficult to understand how the majority can essentially nullify the unequivocal language in her father's letter. This is a rare case where we need not speculate on percentages. Her father clearly states, "I guarantee you that you'll not get from this situation. . . . You'll be circumcised and sent into marriage before my death." Therefore, if this Court found that the likelihood of Haoua suffering FGM if returned to her home country "*would approach* 100%," *Haoua*, 472 F.3d at 232

(emphasis added), then the likelihood that Gomis will be circumcised if returned to Senegal *is* 100%.

The IJ found Gomis credible, which means that her testimony regarding the practices of her specific ethnic group should have been properly considered, along with the abundance of evidence from her family that *she will* be circumcised upon her return. Only by reading the State Department's report generally, and isolating Gomis's age and urban upbringing in order to apply them blindly to the statistics presented, can one possibly conclude that Gomis is unlikely to undergo FGM. To deny her withholding of removal and send her back to Senegal, to virtually certain circumcision, would be a great miscarriage of justice. If we choose to ignore the blatant evidence before us of her specific situation by shielding our eyes with general statistics, then we will be sending her to a torturous future of which I shudder to imagine. Thus, I dissent.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A98 858 113 – Arlington, VA

Date: MAR 10 2008

In re: FRANCOISE ANATE GOMIS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Kell Enow, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. The respondent's appeal of the Immigration Judge's November 8, 2006, decision denying her applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the

Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), and for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16-.18 (2007), is dismissed.

The respondent, a native and citizen of Senegal, was first admitted to the United States on January 30, 2001, as a nonimmigrant domestic employee with authorization to remain in the United States for a period not to exceed April 30, 2003 (Exh. 1). The respondent remained in the United States beyond the authorized period and was placed into the instant proceedings with the issuance of the Notice to Appear on July 27, 2005 (Exh. 1). The record reflects that the respondent filed an application for asylum in June 2005 (Exh. 2). During her proceedings, the respondent renewed her application for asylum and withholding of removal based upon her fear that she will suffer female genital mutilation ("FGM") if she is returned to Senegal (I.J. at 2; Exh. 2). According to the respondent, her parents have found a man for her to marry and she will be subjected to FGM prior to the marriage (Exh. 2).

In his November 8, 2006, decision, the Immigration Judge first noted that the respondent failed to file her application within 1-year of the expiration of her visa on April 30, 2003 (I.J. at 10). The Immigration Judge went on to conclude that the respondent failed to establish changed or extraordinary circumstances excusing her failure to timely file based upon her claim that her sister was forced to undergo FGM in February 2005 (I.J. at 10-

11). In this regard, the Immigration Judge noted that the respondent's testimony that she originally fled Senegal in 2001 because her parents had arranged a marriage and were threatening to force her to undergo FGM prior to the arranged marriage (I.J. at 10-11). The respondent indicated that she remained in the United States because she continued to fear FGM (I.J. at 10-11). As a result, the Immigration Judge did not find the alleged FGM performed on the respondent's sister in February 2005 to constitute such changed circumstances as to excuse the untimely filing inasmuch as the entire reason the respondent claims to have left Senegal in 2001 was to avoid the threat of FGM (I.J. at 10-11). Despite the respondent's contentions on appeal, we find no error in the Immigration Judge's decision for the reasons stated therein (I.J.a t 10-11).

Moreover, we find no clear error in the Immigration Judge's factual determination that while people continue to practice FGM in Senegal in the rural areas, the practice of FGM is growing less common and is rare in large urban areas, and the government of Senegal has enacted laws criminalizing the practice (I.J. at 12-13; Exh. 5).[1] *See* 8 C.F.R. § 1003.1(d)(3)(i). The record reflects that the government has prosecuted those caught engaging in the practice of FGM and has fought to end the

---

[1] Contrary to the respondent's assertions in her Notice of Appeal, the Immigration Judge did not make an adverse credibility determination and, in fact, characterized the respondent as "genuinely credible" (I.J. at 9).

practice by collaborating with other groups to educate people about the inherent dangers (Exh. 5). In fact, during 2004 and 2005, 140 villages renounced the use of FGM (Exh. 5). Further, the record reflects that FGM is hardly practiced in the most heavily populated urban areas such as that where the respondent is from and that 90 percent of the females who undergo FGM are between 2 and 5 years of age (Exh. 5). Thus, we acknowledge that the 28-year-old respondent may have a subjectively genuine fear of FGM if she is returned to Senegal; however, we agree that she has failed to meet her burden of establishing that it is objectively more likely than not that she would be subjected to the procedure if returned to Senegal. *Cf. Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007) (finding Immigration Judge erred in concluding that alien from Niger had less than 10 percent chance of undergoing FGM in that country for purposes of qualifying for asylum based upon government's concession that respondent, in her particular circumstances, stood a nearly 100 percent chance of undergoing FGM in Niger if returned); *see generally Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007).

Finally, we find no reason to disturb the Immigration Judge's decision denying the respondent's application for protection under the Convention Against Torture. *See Haoua v. Gonzales*, *supra* (finding that alien failed to establish burden of proof for protection under the Convention Against Torture based upon fear of FGM).

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Arlington, Virginia

File A 98 858 113 November 8, 2006

In the Matter of

FRANCOISE ANATE GOMIS,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act as amended.

APPLICATIONS: Asylum pursuant to INA 208(a);
Withholding of removal pursuant to INA 241(b)(3);
Withholding of removal under the U.N. Convention Against Torture;
Voluntary departure pursuant to INA 240B

ON BEHALF OF RESPONDENT:

Kell Enow, Esquire

ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:

Frank Rangoussis, Assistant Chief Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is an adult female, native and citizen of Senegal, who was issued a Notice to Appear on July 27, 2005. The Notice to Appear charges that the respondent is removable under Section 237(a)(1)(B) of the INA because she remained in the United States for a time longer than permitted.

The respondent admitted the factual allegations in the Notice to Appear and conceded removability, See INA Section 240(c)(1)(A). The Court finds that removability has been established by clear and convincing evidence. Senegal is designated as the country of removal. The issue before the Court concerns the respondent's applications for relief from removal, specifically asylum, withholding of removal pursuant to the INA, withholding of removal under the U.N. Convention Against Torture, and in the alternative voluntary departure.

I will deny the respondent's applications for asylum, for withholding of removal pursuant to the INA, and for withholding of removal pursuant to the Convention Against Torture. I will grant the respondent's application for voluntary departure.

EVIDENCE AND TESTIMONY

The respondent bases her claims on an assertion she will be persecuted in Senegal, namely that her family will force her to undergo female genital mutilation or excision or circumcision, advance of an arranged marriage in that country.

The following documents were marked and entered into evidence:

Exhibit 1: The Notice to Appear.

Exhibit 2: The I-589 or asylum application of the respondent and a five page typed statement of the respondent:

Exhibit 3: Some additional supporting materials submitted to the Asylum Office.

Exhibit 4: A September 2, 2005 submission on behalf of the respondent with Tabs A through J.

Exhibit 5: A October 26, 2006 submission on behalf of the respondent with Tabs A through G.

Exhibit 6: A October 27, 2006 submission on behalf of the respondent with Tab A.

The respondent was the only witness at today's hearing. She testified on behalf of her claim on both direct and cross-examination.

She testified she is a 28-year-old woman and citizen of Senegal. She is from the Djola ethnic or tribal group in Senegal. She testified that the Djola practiced circumcision or other forms of FGM. She indicated she is single and has no children. She testified she attended college from 1992 to 1999. She says she stopped in 1999 because her parents took her out of school in June 1999, she said they wanted to make her ready for excision and eventual marriage. She was shocked to hear this because she wanted to go to school and be independent. She was also angry.

She says she went to the police to complain about this in her neighborhood, and that they told her to return to her family and try to solve the problem because it is a family matter. She also spoke to an uncle of hers in France who, according to the respondent, tried to talk to her father about the issue but got nowhere.

She testified the man her family wanted her to marry was over 60 years old. She says he visited the family and gave them gifts. He also, according to the respondent, paid a "bribe prize" in November 2000. She said that although the man knew she did not want to marry him that he kept insisting and offering gifts to her family.

She indicated that with the help of the friend of her uncle she obtained a passport in October 1999. The friend of her uncle worked for the International Monetary Fund, or IMF, and helped her get a visa to the United States. This was done without her

parents knowledge. She said she went into hiding at a friend's house, ultimately had an interview at the U.S. Embassy but did not tell the Consulate Officer she was fleeing persecution because she was not asked about that. And then came to the United States to work for this IMF Official. She worked for him as a domestic servant.

She said that her parents, when they learned she had left the country, still wanted her to be excised and to marry the man in Senegal. She testified that she stopped working for the IMF Official in 2003 when he moved from the United States to Nigeria. She said she contacted her uncle at this point and he went to Senegal to talk to her parents and try to change their minds, but was unsuccessful. She said her sister was then subjected to some sort of female genital mutilation or FGM in 2005.

She testified that her sister suffered adverse health effects as a result of FGM, including being traumatized, the loss of blood, and infection. When asked why she did not file for asylum in 2003 after her employer left the United States and went to Nigeria, she stated that she thought her uncle would be able to convince her parents to stop insisting that she undergo FGM and get married, and that she could then return to Senegal. However, she said once she learned her sister had been circumcised she knew that her parents would not change their minds. It was after that she filed for asylum.

The respondent testified she is against the practice of FGM, she is afraid of it and afraid of what it could do in the way of infections or worse.

She testified that her father is a businessman in Dakar, Senegal and that he has two wives, both of whom have been excised or circumcised. She ultimately filed for asylum, she stated, in June 2005. She described the practice of FGM in her Djola culture. She said that the normal practice is for a person to be picked up at night and to stay with people of her own age in a room, and then ultimately to have four women come in, hold the person down while a fifth person does the operation. She says if you resist you will not find a husband in Senegal, and you have to do it unless you leave the country.

In her own estimation she said she believes among the Djola that eighty to one hundred percent of the women have been circumcised. She said she would be nowhere safe in Senegal if she returned there. She said if she did return they would find her and force her to undergo circumcision and to marry. That is a general summary of direct examination of the respondent.

There was also detailed cross-examination which I will not summarize in this oral decision, which however it is available as part of the available Record of Proceedings and transcript in this case.

The Department of Homeland Security opposes the respondent's applications for relief. Department of Homeland Security argues the

respondent is not credible and the respondent has failed to meet her burden of proof.

STATEMENT OF THE LAW

Burden of proof, Credibility, and Corroboration

The respondent has the burden of proof on the applications for relief.

In meeting her burden the respondent's credibility is very important and may be determinative. While it may be possible to grant an application solely on the basis of a respondent's testimony, to do so that testimony should be believable, consistent, and sufficiently detailed to provide a plausible and coherent account for the basis of her fear. Matter of Dass, 20 I&N Dec. 120 (BIA 1989).

Testimony is not considered credible when it is inconsistent, contradictory with current country conditions, on inherent implausible. Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997).

Any material discrepancies or omissions should be explained satisfactorily by the respondent. Generally corroborating evidence should be presented where it is reasonably presentable, Matter of Dass, supra. A respondent who does not offer such reasonably available corroborating evidence should explain the failure to do so, Matter of S-M-J, supra.

In accordance with Circuit Law even in cases where the respondent does not testify credibly, the adjudicator should evaluate the record as a whole to

determine whether independent evidence establishes the respondent's claims, Camara v. Ashcroft, 378 F. 3d 361 (4th Cir. 2004).

Asylum

To be eligible for asylum, the respondent must show that she is a "refugee" within the meaning of the Immigration and Nationality Act INA Section 101(a)(42)(A). To do so she must demonstrate that she is unwilling or unable to return to the other country, in this case Senegal, because of persecution or a well-founded fear of persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified on other grounds Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). A well-founded fear of persecution must be subjectively genuine and objectively reasonable, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

If the respondent establishes past persecution than it is a regulatory presumption that she has a well-founded fear of future persecution on the same basis. 8 C.F.R. 1208.13(b)(1). IN the absence of past persecution the respondent must demonstrate a well-founded fear of future persecution. 8 C.F.R. 1208.13(b)(2) DJOLA.

Withholding of removal

To qualify for withholding of removal, the respondent must show that her life or freedom would be threatened in the other country, in this case

Senegal, because of her race, religion, nationality, membership in a particular social group, or political opinion. INA Section 241(b)(3). That is, the respondent must show a "clear probability" of persecution on one of the enumerated grounds, INS v. Stevic, 467 U.S. 407 at 413 (1984).

To meet that standard the respondent must show that it is "more likely than not" that she will be persecuted in the other country on one of those grounds. See Matter of Mogharrabi, supra. This is a higher standard than for asylum, as with asylum if the respondent demonstrate past persecution she benefits from a rebuttable presumption of future persecution. 8 C.F.R. 1208.16(b)(1).

Relief under the Convention Against Torture

To be eligible for withholding of removal under the Convention Against Torture, the respondent must show that it is more likely than not that she would be subject to torture in the other country "by or at the instigation of, or with the consent or acquiescence of a public official, or person acting in an official capacity". See 8 C.F.R. 1208.18(a)(1). Unlike asylum, which requires a showing of nexus, for CAT protection the respondent need not establish that the torture is on any account of any particular ground. See Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000).

FINDINGS AND ANALYSIS

The Court has considered all of the testimony and documentary evidence presented in this case. I will first address the credibility of the respondent.

I have had the opportunity to listen to her testimony and to observe her demeanor. I find her to be a genuinely credible witness. Her testimony was plausible, generally and internally consistent, and consistent with the asylum application and statement that she filed. The respondent appeared to testify and answer questions forthrightly and truthfully during both the direct and cross-examination.

Her testimony with respect to the incidents and prevalence and timing of FGM in Senegal in general, and in her ethnic or tribal group in particular, is somewhat at odds and inconsistent with State Department Reports in the Record of Proceedings. Although somewhat troubling, it should be more to the lack of knowledge on the part of the respondent rather than an effort to deceive.

Some of the other record evidence, such as the letters and medical certificate provided supports the respondent's claims. But in the view of the Court it does not, even combined with her testimony, carry hr burden of proof.

Other record evidence, including the State Department Human Rights and FGM Reports for Senegal actually do more to undercut than to support her claim.

An applicant for asylum must show by clear and convincing evidence that the application was filed within one year of her last arrival in the United States, INA Section 208(a)(2)(B). The respondent can be excused from this requirement only if she demonstrate materially changed circumstances effecting eligibility for asylum or extraordinary circumstances directly related to the delay in filing. INA Section 208(a)(2)(D); 8 C.F.R. 1208.4(a)(4) and (a)(5). The respondent must file within a reasonable period of the change circumstances or extraordinary circumstances.

I do not believe the respondent has met her burden of proof on this issue. She entered the United States on January 31, 2001. Her authorized stay in the United States ended on April 31, 2003. She did not file for asylum until June 8, 2005. Nor do I believe that the respondent has shown that this late filing is excused by changed or extraordinary circumstances. The respondent left Senegal in 2001, allegedly to avoid FGM and forced marriage. The threat she feared existed at the time she entered the United States in 2001. She did not file for asylum within one year of her arrival. She did not even file for asylum within one year of the expiration of her authorized stay in the United States (again her authorized stay expired in April 2003, a year later would have been April 2004. She did not file until June 2005.)

Instead, she waited until June 8, 2005 to file for asylum, more than a year after her authorized

stay had expired. Even if her sister underwent FGM in the interim period, and even if the respondent continued to receive threats or pleas from her parents that she should return and face the same, that does not constitute changed or extraordinary circumstances. It simply confirms the preexistent risk of persecution she claims she had when she arrived here in the United States. It does not show "changed circumstances", but rather confirms that there exists the same circumstances she fled back in 2001. In the view of the Court it does not justify her late filing. Her asylum claim is statutorily bared.

PAST PERSECUTION ANALYSIS

Based on the totality of testimony in evidence presented in this case I find the respondent has not met her burden of proof that she has suffered past persecution in Senegal. There is really no claim of past persecution in this case.

FEAR OF FUTURE PERSECUTION

In the absence of past persecution and when asylum is bared, as it is in this case because of the late filing, to obtain withholding of removal under Section 241(b)(3) of the INA, the respondent must demonstrate that it is "more likely than not" that she will be persecuted should she return to Senegal. She has not done so.

The Court wishes to emphasize that it is fully cognizant of the fact that female genital mutilation does constitute persecution under U.S. law and the law of this Circuit. The practice does strike at the

very core of a women's bodily integrity. However, the issue in this case is whether the respondent has shown that such persecution would be "more likely than not" should she return to Senegal. As indicated I do not believe she has made such a showing.

Based on the Record of Proceedings I believe there is some small chance, perhaps what even amount to a reasonable possibility, given her parents interest and desire in having her undergo FGM, that she would be subjected to this practice. But it is not, in the view of the Court, anything close to a more likely than not chance.

The record evidence makes clear that most Senegalese women have not undergone FGM. It also makes clear that FGM is growing less common in Senegal. The FGM Report for Senegal, issued by the State Department, indicates that "it is hardly practiced at all in the most heavily populated urban areas." The Court notes that this respondent is from one of the most heavily populated urban areas in Senegal.

In addition, with respect to the respondent's own ethnic or tribal group, the Djola, the State Department Report says, "mostly rural elements of the Djola practice it as a puberty initiation right." The Court notes that, again, the respondent lived in Dakar, a very large city. The Court also notes the respondent is 28 years old, well past the age of puberty.

In addition, the Court notes that FGM is a criminal offense in Senegal, punishable between six months and five years imprisonment. The State Department Report indicates that the government has actually prosecuted people for FGM and has fought to end it. In addition, the Court notes this respondent, as stated, is 28 years old. She is also relatively well-educated and would be better able to relocate in a safe place in Senegal than a younger or less educated person would be.

In short, based on a totality of the record of evidence in this case I simply cannot conclude that this respondent has met her burden of proof of establishing that it is more likely than not she would be subjected to this horrible practice.

Consequently, withholding of removal must be denied pursuant to the INA, just as I also denied her asylum claim pursuant to the one year bar.

Finally, turning to her claim of removal pursuant to the Convention Against Torture, I find the following. Even assuming that the practice of FGM amounts to torture, which is not entirely clear from the record, the respondent has not shown that it is "more likely than not" that she would be subjected to it. As noted the government as criminalized FGM any small risk from her family that the respondent does face of having it done to her would certainly not be with the consent or acquiescence of the government of Senegal or government officials.

To qualify for voluntary departure the respondent must establish she has been physically present in the United States for a period of at least one year immediately proceeding the date the NTA was served; she has been a person of good moral character for at least five years immediately proceeding her application; she is not deportable as an aggravated felon or on security grounds; and that she has established by clear and convincing evidence that she has the means to depart the United States and intends to do so.

The respondent has been in the United States for a period of over one year from the date the Notice to Appear was served. The respondent testified she has not been arrested or convicted of any crimes. She also testified that she would abide by any order of the Court to depart the country, and that she has a passport and the financial means to depart the country. Thus, I find the respondent is statutorily and discretionarily eligible for, and deserving of, this minimal form of relief.

ORDERS OF THE COURT

Accordingly the following orders are entered:

The respondent's application for asylum is denied.

The respondent's application for withholding of removal pursuant to the INA is denied.

The respondent's application for withholding of removal pursuant to the Convention Against Torture is denied.

The respondent's application for voluntary departure is granted.

The respondent must depart the United States on or before January 8, 2007, or any extension that may be granted by the Department of Homeland Security, and under such conditions as the Department of Homeland Security may impose. The respondent must post a bond to the Department of Homeland Security in the amount of $500 within five business days. If the respondent fails to post the bond required, or fails to depart as required, the privilege of voluntary departure shall be withdrawn immediately without further notice or proceedings, and the respondent shall be removed from the United States to Senegal.

THOMAS G. SNOW

United States Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A98 858 113 – Arlington, VA

Date: JUL 08 2008

In re: FRANCOISE ANATE GOMIS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Kell Enow, Esquire

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reconsider our decision dated March 10, 2008. "A motion to reconsider is a request that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked. A motion to reconsider challenges the Board's original decision and alleges that it is defective in some regard." *Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006) (citations omitted). The respondent's motion has presented no such legal argument, change of law, or overlooked argument or aspect that convinces us that we erred in our prior conclusion that the respondent

had failed to meet her burden of proof for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), by showing that it is more likely than not that she would be subjected to persecution if returned to Senegal. *See INS v. Stevic*, 467 U.S. 407 (1984).

The respondent cites the ruling by the United States Court of Appeals for the Fourth Circuit in *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007), as support for her claim that she has met her burden of proof for withholding of removal by showing that it is more likely than not that she would be persecuted by being subjected to female genital mutilation (FGM) in Senegal. However, we were aware of, and cited, *Haoua* in our decision. We again find that case distinguishable because the asylum applicant in that case faced a nearly 100% chance of being subjected to FGM if returned to Niger. The respondent here has not made such a showing.

The respondent also likens her case to that of another alien granted withholding of removal by the Board in an unpublished decision based upon a likelihood of facing FGM in Senegal. However, every case turns on its own merits, and the evidence presented in the respondent's case is markedly different from that presented in the referenced case. For instance, the respondent and the alien in the referenced case belongs to, and thus are subject to the customs of, different tribes, the Djola and the Troucouleur respectively.

Accordingly, the motion is denied.

Constitutional, Statutory and Regulatory Provisions Involved

Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

* * * *

8 U.S.C. 1158(a)(2)

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General

finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

* * * *

8 U.S.C. 1158(a)(3)

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

* * * *

8 U.S.C. 1252(a)(2)(B)

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

* * * *

8 U.S.C. 1252(a)(2)(D)

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * * *

8 C.F.R. § 208.4(a)(2)

(2) *One-year filing deadline.* (i) For purposes of section 208(a)(2)(B) of the Act, an applicant has the burden of proving:

(A) By clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or

(B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline.

(ii) The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. When the last day of the period so computed falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday,

Sunday, or legal holiday. For the purpose of making determinations under section 208(a)(2)(B) of the Act only, an application is considered to have been filed on the date it is received by the Service, pursuant to § 103.2(a)(7) of this chapter. In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date. For cases before the Immigration Court in accordance with § 3.13 of this chapter, the application is considered to have been filed on the date it is received by the Immigration Court. For cases before the Board of Immigration Appeals, the application is considered to have been filed on the date it is received by the Board. In the case of an application that appears to have been filed more than a year after the applicant arrived in the United States, the asylum officer, the immigration judge, or the Board will determine whether the applicant qualifies for an exception to the deadline.

* * * *

8 C.F.R. § 208.4(a)(4)

(4) *Changed circumstances.* (i) The term "changed circumstances" in section 208(a)(2)(D) of the Act shall refer to circumstances materially affecting the

applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

* * * *

8 C.F.R. § 208.4(a)(5)

(5) The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals that the circumstances were not intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;

(ii) Legal disability (*e.g.*, the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;

(iii) Ineffective assistance of counsel, provided that:

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and

what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;

(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter; and

(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

Supreme Court, U.S.
FILED
NOV 19 2009
OFFICE OF THE CLERK

146

(3)

No. 09-194

In the Supreme Court of the United States

FRANCOISE ANATE GOMIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' conclusion that petitioner failed to establish "to the satisfaction of the Attorney General" either "changed circumstances" or "extraordinary circumstances" to excuse the untimely filing of her asylum application under 8 U.S.C. 1158(a)(2)(D).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 10
Conclusion 22

TABLE OF AUTHORITIES

Cases:

A-K-, In re, 24 I. & N. Dec. 275 (B.I.A. 2007), petition for review denied *sub nom Kane* v. *Holder*, 581 F.3d 231 (5th Cir. 2009) 21

Almuhtaseb v. *Gonzales*, 453 F.3d 743 (6th Cir. 2006) ... 16

Chacon-Botero v. *United States Att'y Gen.*, 427 F.3d 954 (11th Cir. 2005) 16

Chen v. *United States Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006) 16

D-I-M-, In re, 24 I. & N. Dec. 448 (B.I.A. 2008) 21

Eman v. *Holder*, cert. denied, No. 08-1317 (Oct. 5, 2009) 10

Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996) 15

Ferry v. *Gonzales*, 457 F.3d 1117 (10th Cir. 2006) 16

Haig v. *Agee*, 453 U.S. 280 (1981) 11

Higuit v. *Gonzales*, 433 F.3d 417 (4th Cir.), cert. denied, 548 U.S. 906 (2006) 13

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 4

INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 19

INS v. *St. Cyr*, 533 U.S. 289 (2001) 14

Ignatova v. *Gonzales*, 430 F.3d 1209 (8th Cir. 2005) 16

Cases—Continued: Page

Kourouma v. *Mukasey*, 128 S. Ct. 1868 (2008) 11
Lopez-Cancinos v. *Gonzales*, 550 U.S. 917 (2007) 11
Lopez-Soto v. *Ashcroft*, 383 F.3d 228 (4th Cir. 2004) 4
Pierre, In re, 15 I. & N. Dec. 461 (B.I.A. 1975) 4
Ramadan v. *Gonzales*, 479 F.3d 646 (9th Cir. 2007) .. 16, 17
Reno v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) 15
Sukwanputra v. *Gonzales*, 434 F.3d 627 (3d Cir. 2006) 11, 16
Usman v. *Holder*, 566 F.3d 262 (1st Cir. 2009) 16
Viracacha v. *Mukasey*:
129 S. Ct. 451 (2008) 10
518 F.3d 511 (7th Cir.), cert. denied, 129 S. Ct. 451 (2008) 16
Webster v. *Doe*, 486 U.S. 592 (1988) 11
Zhu v. *Gonzales*, 493 F.3d 588 (5th Cir. 2007) 16

Treaty, statutes and regulations:

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 3
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 12
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1101(a)(42)(A) 2
8 U.S.C. 1158(a)(2) 13, 18, 21

Statutes and regulations—Continued: Page

8 U.S.C. 1158(a)(2)(B) 2
8 U.S.C. 1158(a)(2)(D) 2, 11, 12, 20
8 U.S.C. 1158(a)(3) 4, 8, 12, 13, 17, 21
8 U.S.C. 1158(b)(1) 2
8 U.S.C. 1158(b)(1)(A) 2
8 U.S.C. 1158(b)(1)(B)(i) 2
8 U.S.C. 1158(d)(1) 2
8 U.S.C. 1227(a)(1)(B) 5
8 U.S.C. 1231 12
8 U.S.C. 1231(b)(3)(A) 3
8 U.S.C. 1252(a)(2) 4
8 U.S.C. 1252(a)(2)(B)(ii) 21, 22
8 U.S.C. 1252(a)(2)(D) ..... *passim*
8 U.S.C. 1252(b)(4)(B) 19
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310 4
8 C.F.R.:
Section 1208.4(a)(2)(A) 2
Section 1208.4(a)(4)(i)(A) 3, 20
Section 1208.4(a)(4)(i)(B) 3, 20
Section 1208.4(a)(4)(ii) 3
Section 1208.4(a)(5) 3, 20
Section 1208.13(a) 2
Section 1208.13(b)(2)(ii) 21
Section 1208.13(b)(3)(i) 21
Section 1208.13(c)(1) 3
Section 1208.16(b)(2) 4

Regulations—Continued: Page

Section 1208.16(c) 3
Section 1208.18(a)(1) 4
Section 1240.8(d) 2

Miscellaneous:

H.R. Rep. No. 72, 109th Cong., 1st Sess. (2005) 14, 15

In the Supreme Court of the United States

No. 09-194

FRANCOISE ANATE GOMIS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 571 F.3d 353. The decisions of the Board of Immigration Appeals (Pet. App. 28a-32a) and the immigration judge (Pet. App. 33a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2009. A petition for a writ of certiorari was filed on August 11, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in their discretion, grant asylum to an alien who demon-

strates that she is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). The applicant bears the burden of demonstrating that she is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

b. An alien who wishes to be granted asylum must file her application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B). An alien who fails to meet that requirement "may be considered" for asylum if she demonstrates "to the satisfaction of the Attorney General" or the Secretary of Homeland Security either the existence of "changed circumstances" that materially affect her eligibility for asylum or "extraordinary circumstances" that excuse her failure to file the application within the one-year period. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating, "by clear and convincing evidence," that her application for asylum was filed within one year of her entry into the United States. 8 U.S.C. 1158(a)(2)(B); 8 C.F.R. 1208.4(a)(2)(A).

The Attorney General, who is responsible for adjudicating asylum applications filed by aliens in removal proceedings, 8 U.S.C. 1158(d)(1), has defined the term "changed circumstances" by regulation to include "[c]hanges in conditions in the applicant's country of

nationality" and "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared prosecution that place the applicant at risk." 8 C.F.R. 1208.4(a)(4)(i)(A) and (B). The Attorney General has defined "extraordinary circumstances" as personal circumstances "directly related to the failure to meet the 1-year deadline" that "were not intentionally created by the alien through his or her own action or inaction," including "[s]erious illness or mental or physical disability," "[l]egal disability," "death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family," and "[i]neffective assistance of counsel." 8 C.F.R. 1208.4(a)(5). In addition to showing "changed circumstances" or "extraordinary circumstances," the applicant must show that she filed her asylum application within a reasonable period of time given those circumstances. 8 C.F.R. 1208.4(a)(4)(ii) and (5).

c. An applicant who is ineligible for asylum because of an untimely filed application remains eligible for withholding of removal, see 8 U.S.C. 1231(b)(3)(A), and protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See 8 C.F.R. 1208.13(c)(1), 1208.16(c).

Withholding of removal is available if the alien demonstrates that her "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal,

an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987). Persecution must be at the hands of the government or by an entity that the government is unwilling or unable to control. *In re Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975). An alien is not eligible for withholding of removal if he or she "could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. 1208.16(b)(2).

In addition, an alien who demonstrates that she would more likely than not be tortured if removed to a certain country may obtain CAT protection. To qualify for CAT protection, the acts alleged to constitute torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. 1208.18(a)(1); see, *e.g.*, *Lopez-Soto* v. *Ashcroft*, 383 F.3d 228, 234 (4th Cir. 2004).

d. Under the INA, "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the timeliness of an asylum application, including a determination whether the alien has demonstrated to the satisfaction of the Attorney General that there are changed or extraordinary circumstances warranting consideration of an untimely application. 8 U.S.C. 1158(a)(3). In 2005, Congress amended one subsection of the judicial review provision of the INA, 8 U.S.C. 1252(a)(2), to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section)

> which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

2. Petitioner is a native and citizen of Senegal. Pet. App. 2a. She arrived in the United States in January 2001 as a non-immigrant worker with permission to remain through April 2003. *Id.* at 3a.

Petitioner remained in the United States after her lawful status expired. Pet. App. 3a. In June 2005, she filed an application for asylum, withholding of removal, and CAT protection. *Ibid.* Petitioner contended that she would be persecuted if she returned to Senegal because her parents wanted her to undergo female genital mutilation (FGM) and to participate in an arranged marriage. *Ibid.* The Department of Homeland Security charged petitioner with being removable as an alien who remained in the United States beyond the time permitted and referred her asylum application to an immigration judge (IJ). *Id.* at 3a, 34a; see Administrative Record (A.R.) 330; see also 8 U.S.C. 1227(a)(1)(B).

At her removal hearing, petitioner conceded that she was removable as charged. She renewed her application for asylum, withholding of removal, and CAT protection. Pet. App. 3a-4a, 34a. In the alternative, she sought voluntary departure. *Ibid.* Petitioner was the only witness to testify at her removal hearing. *Id.* at 35a. She stated that she is a member of the Djola ethnic group, some of whose members practice FGM. *Id.* at 4a. She explained that she had been enrolled in college in Senegal, but left

home because her father wanted her to undergo FGM and take part in an arranged marriage. *Id.* at 4a, 36a; A.R. 160-162. Petitioner stated that her uncle helped her to obtain a work visa to leave Senegal and work in the United States. Pet. App. 4a, 36a-37a; A.R. 163-164. Petitioner stated that she filed her asylum application in June 2005 because that is when she learned that FGM had been performed on her sister. Pet. App. 37a; A.R. 166.

The IJ found petitioner removable as charged, rejected her asylum, withholding, and CAT claims, and granted her application for voluntary departure. Pet. App. 33a-48a. The IJ determined that petitioner was a credible witness, even though her testimony was "somewhat at odds and inconsistent with State Department Reports." *Id.* at 42a. The IJ found petitioner ineligible for asylum, however, because she did not file her application within one year of entry into the United States and did not demonstrate changed or extraordinary circumstances to excuse her untimely filing. *Id.* at 43a-44a. As the IJ explained, petitioner "left Senegal in 2001, allegedly to avoid FGM and forced marriage," but did not seek asylum until June 2005. *Id.* at 43a. The IJ determined that, even if petitioner's "sister underwent FGM in the interim period, and even if [petitioner] continued to receive threats or pleas from her parents that she should return and face the same, that does not constitute changed or extraordinary circumstances." *Id.* at 44a. Instead, the IJ explained, those circumstances simply "confirm[]" a "preexist[ing] risk of persecution" that existed when petitioner came to the United States. *Ibid.*

The IJ then determined that petitioner failed to meet her burden of establishing that it was more likely than not that she would be persecuted if returned to Senegal,

as is required for withholding of removal. Pet. App. 44a-46a. The IJ determined that the chances of petitioner being forced to undergo FGM in Senegal are "small" because the evidence in the record showed that "most Senegalese women have not undergone FGM"; FGM "is growing less common in Senegal"; the State Department's report on FGM indicates that "it is hardly practiced at all in the most heavily populated urban areas," and petitioner lived in an urban center; and those elements of the Djola ethnic group that practice FGM do so as part of a "puberty initiation right," and petitioner was 28 years old. *Id.* at 45a. The IJ also noted that "FGM is a criminal offense in Senegal," carrying a sentence of six months to five years of imprisonment, and that the Senegalese government "has actually prosecuted people for FGM and has fought to end it." *Id.* at 46a. Finally, the IJ stated that petitioner is a well-educated adult and therefore likely could "relocate in a safe place in Senegal." *Ibid.*

The IJ denied petitioner's claim for CAT protection, finding that she failed to show that it is more likely than not that she would be subjected to torture and that, in any event, any such risk "would certainly not be with the consent or acquiescence of the government of Senegal or government officials." Pet. App. 46a. Finally, the IJ granted petitioner's application for voluntary departure and stated that she must depart the United States by January 8, 2007. *Id.* at 47a-48a.

3. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 28a-32a. It determined that petitioner's asylum application was untimely and upheld the IJ's determination that petitioner failed to demonstrate changed or extraordinary circumstances that would excuse her untimely filing. *Id.* at 29a-30a.

The Board found "no error" in the IJ's decision, explaining that petitioner contended that she feared FGM when she left Senegal in 2001 and "remained in the United States because she continued to fear FGM." *Id.* at 30a.

The Board also determined that petitioner failed to meet her burdens for withholding of removal and CAT protection. The Board explained that the record evidence showed that "the practice of FGM is growing less common and is rare in large urban areas"; that "the government of Senegal has enacted laws criminalizing the practice," "has prosecuted those caught engaging in the practice," and "has fought to end the practice by collaborating with other groups to educate people about [its] inherent dangers"; that "140 villages renounced the use of FGM" in 2004 and 2005; and that "90 percent of the females who undergo FGM are between 2 and 5 years of age." Pet. App. 30a-31a. The Board then stated that petitioner was required to voluntarily depart the United States by 60 days from the date of its decision. *Id.* at 32a. To the best of the government's knowledge, petitioner did not depart within the time permitted.

Petitioner filed a motion for reconsideration, which the Board denied, explaining that petitioner "has presented no [additional] legal argument, change of law, or overlooked argument." Pet. App. 49a-51a.

4. The court of appeals denied petitioner's petition for review. Pet. App. 1a-27a. As relevant here, the court held that under 8 U.S.C. 1158(a)(3), it lacked jurisdiction to review the Board's determination that no changed or extraordinary circumstances excused petitioner's late filing of her asylum application. Pet. App. 10a-13a. The court explained that it lacked jurisdiction "under the express language of § 1158(a)(3)" to review both "whether an alien has complied with the one-year

time limit *and* whether there are changed or extraordinary circumstances excusing the delay." *Id.* at 11a-12a. The court further concluded that Section 1252(a)(2)(D) did not restore jurisdiction over petitioner's claim, because "the question whether the changed or extraordinary circumstances exception applies to excuse an alien's delay in filing her asylum application is a *discretionary determination* based on factual circumstances." *Id.* at 12a. The court stated that "absent a colorable constitutional claim or question of law, [its] review of the issue is not authorized by § 1252(a)(2)(D)." *Ibid.*

The court then upheld the Board's determination that petitioner failed to meet her burden for withholding of removal as supported by substantial evidence. Pet. App. 13a-21a.[1]

Judge Gregory concurred in part and dissented in part. Pet. App. 21a-27a. As relevant here, he agreed that the court lacked jurisdiction over petitioner's challenge to the Board's denial of her asylum claim. *Id.* at 22a.

5. After the certiorari petition was filed, a member of the court of appeals requested a poll on whether the court should rehear the case en banc. The court then denied rehearing en banc. See No. 08-1389, 2009 WL 2992535 (4th Cir. Sept. 21, 2009). Two Judges authored opinions respecting denial of rehearing en banc, both of which focused on whether the Board erred in denying withholding of removal. See *id.* at *1 (Niemeyer, J., concurring in denial of rehearing en banc); *id.* at *1-*3 (Gregory, J., dissenting from denial of rehearing en banc, joined by Michael, Motz, King, and

---

[1] Petitioner did not renew her claim for CAT protection before the court of appeals.

Duncan, JJ.). Neither opinion addressed the question presented here.

ARGUMENT

Petitioner contends that the court of appeals erred in holding that it lacked jurisdiction to review the determination of the Board of Immigration Appeals that petitioner failed to demonstrate to its satisfaction either changed circumstances or extraordinary circumstances that would warrant consideration of her untimely asylum application. The court of appeals correctly rejected that contention. But while petitioner's application for the discretionary relief of asylum was rejected as untimely, she was still permitted to apply for withholding of removal. The IJ and the Board fully considered petitioner's withholding claim on the merits and rejected it as not supported by the evidence. The court of appeals sustained the Board's ruling on that issue, and petitioner has not sought review of that ruling in this Court. This case thus presents only the issue whether the court of appeals erred in concluding that it did not have jurisdiction to review the Board's rejection as untimely of petitioner's additional request for the related discretionary relief of asylum.

All but one of the courts of appeals to consider the issue have held that they do not have jurisdiction under 8 U.S.C. 1252(a)(2)(D) to review the Board's determination that an alien failed to demonstrate to its satisfaction that there were changed circumstances or extraordinary circumstances warranting consideration of an untimely application. The Ninth Circuit has reached a contrary conclusion. The Court has nonetheless denied certiorari petitions raising this issue on a number of occasions. See *Eman* v. *Holder*, cert. denied, No. 08-1317 (Oct. 5, 2009); *Viracacha* v. *Mukasey*, 129 S. Ct. 451 (2008) (No.

07-1363); *Kourouma* v. *Mukasey*, 128 S. Ct. 1868 (2008) (No. 07-7726); *Lopez-Cancinos* v. *Gonzales*, 550 U.S. 917 (2007) (No. 06-740). No different disposition is warranted here. Petitioner did not brief the question presented to the court below, and the court consequently did not address the arguments petitioner now makes in support of jurisdiction. Moreover, the court of appeals was correct in holding that it lacked jurisdiction to review petitioner's challenge to the denial of her request for asylum, and resolution of the jurisdictional question likely would not change the outcome of petitioner's case.

1. The court of appeals correctly determined that it lacked jurisdiction over petitioner's fact-bound claim. The ultimate question whether petitioner demonstrated to the satisfaction of the Attorney General the existence of changed circumstances or extraordinary circumstances that warrant consideration of an untimely claim for relief is committed to the Attorney General's discretion based on his own assessment of the circumstances. The INA provides that the Attorney General "may" consider an untimely asylum application if the alien demonstrates changed or extraordinary circumstances "to the satisfaction of the Attorney General." 8 U.S.C. 1158(a)(2)(D). Congress's use of the word "may" "expressly recognizes substantial discretion," *Haig* v. *Agee*, 453 U.S. 280, 294 n.26 (1981), and the phrase "to the satisfaction of the Attorney General" demonstrates Congress's intent that the Attorney General's assessment "entails an exercise of discretion," *Sukwanputra* v. *Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006), in deciding whether to forgive the alien's default. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

In light of the nature of the determination committed to the Attorney General, Congress expressly barred

judicial review of such a determination when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Under 8 U.S.C. 1158(a)(3), "[n]o court shall have jurisdiction to review any determination" regarding the application of the one-year filing deadline for asylum claims, including the determination that a particular asylum applicant has not "demonstrate[d] to the satisfaction of the Attorney General * * * the existence of changed circumstances [that] materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing." 8 U.S.C. 1158(a)(2)(D). As petitioner acknowledges (Pet. 16-17, 20), her petition for review challenged a determination that she had failed to sufficiently demonstrate changed or extraordinary circumstances to forgive that untimely filing. Judicial review of petitioner's challenge is therefore barred by 8 U.S.C. 1158(a)(3).

Significantly, however, an alien is not without an avenue for relief when the Attorney General determines that she has not demonstrated to his satisfaction the existence of circumstances excusing compliance with the one-year deadline for filing an application for the discretionary relief of asylum. The alien remains eligible for mandatory withholding of removal under 8 U.S.C. 1231. But in this case the IJ and the Board rejected that claim. The court of appeals sustained that determination, and petitioner has not sought review of the court of appeals' ruling in this Court.

Petitioner contends (Pet. 29-36), however, that judicial review of the rejection of her asylum claim as untimely should have been available as well, because this case falls within the provision in 8 U.S.C. 1252(a)(2)(D), enacted in 2005 as part of the REAL ID Act, that allows

for judicial review of "questions of law." The structure of 8 U.S.C. 1158(a)(2) and (3) demonstrate, however, that Congress did not regard a fact-bound and discretionary determination by the Attorney General under Section 1158(a)(2)—that an alien had not shown to the Attorney General's satisfaction that there were circumstances that warranted forgiving her procedural default and consideration of her untimely application—to present matters of law of a sort appropriate for judicial review. The enactment of Section 1252(a)(2)(D) in 2005 did not fundamentally alter that judgment of Congress concerning the nature of the Attorney General's determinations about untimely asylum applications, and the court of appeals therefore correctly held that petitioner's challenge to the Board's fact-bound determination did not raise a "question[] of law."

In this case, the applicable principles are undisputed. Petitioner has not advanced any argument that the Board erred in construing the terms "changed circumstances" or "extraordinary circumstances," even assuming that the Attorney General's application of those provisions in the course of a determination under 8 U.S.C. 1158(a)(2) might be reviewable in some circumstances. Instead, petitioner takes issue with the Board's holding that she failed to adduce facts sufficient to show a change in conditions material to her asylum application. Pet. App. 29a-30a. That determination is not a legal determination, but a factual determination involving judgment and discretion. If petitioner's fact-bound challenge to such a determination by the Attorney General raised a "question[] of law," then any error might be a question of law, thereby rendering the jurisdictional bar in 8 U.S.C. 1158(a)(3) meaningless. See, *e.g.*, *Higuit* v. *Gonzales*, 433 F.3d 417, 420 (4th Cir.) (courts "are not

free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive"), cert. denied, 548 U.S. 906 (2006).

Indeed, a challenge to such a determination by the Attorney General is precisely the type of claim over which Congress intended to withhold jurisdiction when it enacted 8 U.S.C. 1252(a)(2)(D). Congress added the exception for "constitutional claims or questions of law" in response to concerns this Court raised about reviewability of removal orders in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the alien's petition for a writ of habeas corpus "raise[d] a pure question of law"—whether, "as a matter of statutory interpretation," the Board erred in determining that he is not eligible for relief. *Id.* at 298. The alien did not challenge the Board's fact-finding, nor did he "contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum." *Ibid.* *St. Cyr* distinguished those types of claims from a "pure legal claim" such as a statutory-interpretation issue, and only stated that precluding judicial review of the latter would raise serious constitutional questions. *Ibid.* (alien "d[id] not dispute any of the facts that establish his deportability or the conclusion that he is deportable").

The Conference Report accompanying the REAL ID Act demonstrates that Congress did not intend the courts of appeals to review the application of undisputed rules of law to the facts of particular cases. Thus, the Conference Report made clear that a claim with both factual and legal elements (a "mixed question of law and fact") is not freely reviewable under Section 1252(a)(2)(D). H.R. Rep. No. 72, 109th Cong., 1st Sess.

175 (2005). Instead, the Report explained that when a court is presented with such a claim, it "should not review any factual elements," such as "questions that courts would review under the 'substantial evidence'" standard. *Id.* at 175-176. This Court has taken a similar approach in other contexts. For example, in *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-841 (1996), involving tort claims in district court, the Court concluded that "[t]he issues of proximate causation and superseding cause involve application of law to fact, which is left to the factfinder, subject to limited review." In the INA, involving the special context of judicial review of agency action, Congress chose to preclude review of such fact-based determinations that arise in connection with an alien's request that the Attorney General exercise his discretion to forgive her procedural default and consider an untimely asylum application. Reading "questions of law" in 8 U.S.C. 1252(a)(2)(D) to encompass determinations such as those at issue here would have the opposite effect of what Congress intended when it committed certain determinations to the judgment and discretion of the Attorney General. See, *e.g.*, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486-487 (1999). Because petitioner brought a fact-bound challenge to a judgment call by the agency, her petition for review did not raise a "question[] of law" on this issue under 8 U.S.C. 1252(a)(2)(D), and the court of appeals therefore correctly determined that it lacked jurisdiction to consider it.

2. In the decision below, the Fourth Circuit joined the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits in holding that such a claim normally does not raise a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). See, *e.g.*,

Usman v. *Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (changed or extraordinary circumstances); *Viracacha* v. *Mukasey*, 518 F.3d 511, 514-516 (7th Cir.) (changed or extraordinary circumstances), cert. denied, 129 S. Ct. 451 (2008); *Zhu* v. *Gonzales*, 493 F.3d 588, 596 n.31 (5th Cir. 2007) (extraordinary circumstances); *Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 330-332 (2d Cir. 2006) (changed or extraordinary circumstances); *Ferry* v. *Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (changed or extraordinary circumstances); *Almuhtaseb* v. *Gonzales*, 453 F.3d 743, 748-749 (6th Cir. 2006) (changed circumstances); *Sukwanputra*, 434 F.3d at 635 (changed or extraordinary circumstances); *Ignatova* v. *Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (extraordinary circumstances); *Chacon-Botero* v. *United States Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (extraordinary circumstances). Those courts have explained that a challenge to the Board's determination that an alien did not establish changed circumstances or extraordinary circumstances "is merely an objection to the IJ's factual findings and the balancing of factors in which discretion was exercised," not an argument that raises a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). *Chen*, 471 F.3d at 332.

In contrast, the Ninth Circuit has held that an alien's challenge to the Board's determination that she has not established changed circumstances or extraordinary circumstances does raise a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). See *Ramadan* v. *Gonzales*, 479 F.3d 646, 649-656 (2007) (changed circumstances). In the Ninth Circuit's view, the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) "extends to questions involving the application of statutes or regulations to undisputed

facts, sometimes referred to as mixed questions of fact and law." *Ramadan*, 479 F.3d at 650.[2]

That disagreement in the courts of appeals does not warrant this Court's attention at this time or in this case.

a. First, as petitioner acknowledges, she did not present any argument on the question presented to the court of appeals. See Pet. 15 n.2 (petitioner "did not brief the jurisdictional issues"). Petitioner's opening brief in the court of appeals simply asserted that the court of appeals had jurisdiction over her petition for review as a general matter—because it was timely filed in the proper court—and made no mention at all of the jurisdictional bar contained in 8 U.S.C. 1158(a)(3) that applied to the Board's asylum determination or to the jurisdiction-restoring provision in 8 U.S.C. 1252(a)(2)(D). Pet. C.A. Br. 11-12. The government then argued in its brief both that Section 1158(a)(3) barred jurisdiction and that Section 1252(a)(2)(D) did not restore jurisdiction in this case. Gov't C.A. Br. 21-24. Petitioner did not file a reply brief. As a result, petitioner did not present to the court of appeals *any* of the arguments that she now advances, including her argument that the application of settled law to the facts of a particular case constitutes a "question[] of law" under 8 U.S.C. 1252(a)(2)(D).

The court of appeals addressed the jurisdictional issue, but its analysis was relatively brief. The court

---

[2] Petitioner cites (Pet. 23-24, 26-28) a variety of cases concerning whether determinations other than whether an alien demonstrated changed or extraordinary circumstances to excuse an untimely asylum filing present "questions of law." Because whether a petition for review presents a "question[] of law" depends on the precise nature of the claim raised (Pet. 23), those cases are inapposite.

stated that it lacked jurisdiction to review petitioner's asylum claim because "the question whether the changed or extraordinary circumstances exception applies to excuse an alien's delay in filing her asylum application is a *discretionary determination* based on factual circumstances"; "absent a colorable constitutional claim or question of law, [the court's] review of the issue is not authorized by § 1252(a)(2)(D)." Pet. App. 12a. But, presumably because petitioner did not address the issue, the court did not elaborate upon what type of claim would present a "question of law," and it did not address the arguments petitioner now advances. Thus, the court did not opine on whether "Section 1252(a)(2)(D) encompasses the application of law to fact, or is instead limited to pure questions of law," Pet. 23; did not address whether petitioner presented a "mixed question of law and fact" or "how to identify a reviewable mixed question of law and fact," Pet. 24; and did not distinguish between "mixed questions [of law and fact]" and "factual or discretionary claims," *ibid.*

In light of petitioner's default below in not presenting arguments in support of jurisdiction to review the Attorney General's determination under 8 U.S.C. 1158(a)(2), this case would not be an appropriate vehicle for considering whether or to what extent Section 1252(a)(2)(D) permits judicial review of such determinations, or more generally whether it provides jurisdiction to consider contentions that the Board erred in applying settled law to the facts of an alien's particular case—an issue that the court of appeals did not address. Instead, the Court should await a case in which the jurisdictional issue was disputed below and where the court of appeals specifically addressed whether the application of settled

law to fact presents a "question[] of law" within the meaning of Section 1252(a)(2)(D).

b. Even if there were jurisdiction, petitioner could not show that the Board erred in failing to consider her untimely asylum application. The governing considerations, which are cast in general terms for the Attorney General to consider to his satisfaction, are undisputed. Petitioner has never contended that the Board used an incorrect legal standard. Instead, she argues that the Board erred in "appl[ying] the statutory standards to the historical facts of the case." Pet. 32.

If the court of appeals were to consider that argument, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). On this record, petitioner could not show that the Board's fact-specific conclusions were not supported by substantial evidence. The only argument petitioner advanced below was that her sister's experience with FGM constituted "changed circumstances" that warranted the Attorney General's exercise of discretion to consider her application. A.R. 97. But as the IJ explained, that is not the type of circumstance that would warrant consideration of petitioner's untimely asylum filing, because petitioner's own circumstances had not changed. Petitioner contended that she "left Senegal in 2001 * * * to avoid FGM and forced marriage," and she claimed that her fear continued in June 2005. Pet. App. 43a. The IJ reasonably determined that even if petitioner's "sister underwent FGM in the interim period, and even if [petitioner] continued to receive threats or pleas from her parents that she should return and

face the same," that simply "confirm[ed]" a "preexist-[ing] risk of persecution" that existed when petitioner came to the United States. *Id.* at 43a-44a. There is no reason to believe that the fact-bound assessment that the baseline remained unchanged would be overturned.

Moreover, petitioner did not contend that "[c]hanges in conditions in [her] country of nationality" made her more likely to be persecuted," 8 C.F.R. 1208.4(a)(4)(i)(A); indeed, she acknowledged that Senegal had increased its efforts to stamp out FGM, Pet. C.A. Br. 27. Nor did petitioner contend that there were any changes in "applicable U.S. law" or that she engaged in any "activities * * * outside the country of feared prosecution that place[d] [her] at risk." 8 C.F.R. 1208.4(a)(4)(i)(B). And petitioner has never claimed that she was operating under any legal disability or that there were any other personal circumstances that would constitute "extraordinary circumstances" and be "directly related to the failure to meet the 1-year deadline." 8 C.F.R. 1208.4(a)(5) (listing, *inter alia*, "[s]erious illness or mental or physical disability," "[l]egal disability," "death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family," and "[i]neffective assistance of counsel"). Under the circumstances, petitioner has failed to demonstrate changed circumstances or extraordinary circumstances within the meaning of Section 1158(a)(2)(D).

c. Even if petitioner could demonstrate that the Board erred in its determination that she failed to show circumstances sufficient to excuse her untimely asylum application, petitioner's asylum claim likely would fail on the merits. If an asylum applicant could avoid persecution by relocating within her home country, and it

is reasonable to expect her to do so, then she does not have a well-founded fear of future persecution. 8 C.F.R. 1208.13(b)(2)(ii). Here, where petitioner has not alleged past persecution and alleges persecution only by her parents—not "persecution [that] is by a government or is government-sponsored"—she bears the burden of proving, by a preponderance of the evidence, that relocation would not be reasonable. 8 C.F.R. 1208.13(b)(3)(i); *In re D-I-M-*, 24 I. & N. Dec. 448, 450 (B.I.A. 2008). The IJ concluded, in the context of rejecting petitioner's claim for withholding of removal, that petitioner likely would be able to relocate within Senegal because of her age and education. Pet. App. 46a. The court of appeals also suggested as much, noting petitioner's age and education and observing that Senegal is a country of over 12 million people. *Id.* at 5a n.*, 9a. And, in a precedential decision recently affirmed by the Fifth Circuit, the Board concluded, based on country conditions in Senegal, that an alien's daughters could avoid being subjected to FGM there by relocating to an area of comparative safety. See *In re A-K-*, 24 I. & N. Dec. 275, 277 (B.I.A. 2007), petition for review denied *sub nom. Kane* v. *Holder*, 581 F.3d 231 (2009). It is therefore highly unlikely that petitioner would be able to prove that it would be unreasonable for her to relocate to a safe place in her home country. Review by this Court is unwarranted for this reason as well.[3]

---

[3] Because jurisdiction to review the Attorney General's timeliness determination under 8 U.S.C. 1158(a)(2) in this case was precluded by the special jurisdictional bar in 8 U.S.C. 1158(a)(3), there is no need to consider whether jurisdiction was also precluded by 8 U.S.C. 1252(a)(2)(B)(ii), which bars jurisdiction to review any decision of the Attorney General that is specified under the relevant subchapter of the INA to be in the discretion of the Attorney General. There accordingly

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

NOVEMBER 2009

---

is no occasion to hold the petition in this case pending the Court's decision in *Kucana* v. *Holder*, No. 08-911 (argued Nov. 10, 2009), which concerns the scope of 8 U.S.C. 1252(a)(2)(B)(ii). (Section 1252(a)(2)(B)(ii) excepts from its bar "the granting of relief under section 1158(a)," but that exception refers to the granting (or denial) of the discretionary relief of asylum on the merits, not a determination concerning the one-year filing requirement.)

140

No. 09-194

Supreme Court, U.S.
FILED
DEC 1 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FRANCOISE ANATE GOMIS,

Petitioner,

—v.—

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LUCAS GUTTENTAG
CAROLINE CINCOTTA
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, California 94111
(415) 343-0770

KELL ENOW
ENOW & ASSOCIATES
2470 Windy Hill Road
Marietta, Georgia 30067
(770) 956-8515

LEE GELERNT
Counsel of Record
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle Street
Suite 1818
Chicago, Illinois 60604
(312) 660-1613

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTRODUCTION 1

ARGUMENT 3

I. THIS CASE PROVIDES AN IDEAL VEHICLE TO RESOLVE AN ENTRENCHED CIRCUIT SPLIT. 3

A. The Briefing And Length Of The Opinion Below Do Not Make This Case An Unsuitable Vehicle. 3

B. Petitioner Would Likely Prevail On Her Asylum Claim. 5

II. THE FOURTH CIRCUIT'S RULING WAS INCORRECT 9

A. Section 1252(a)(2)(D) Covers The Application Of Law To Fact. 9

B. Petitioner's Claim Involves The Application Of Law To Fact 10

CONCLUSION 14

APPENDIX 1a

Decision of the Court of Appeals for the Fourth Circuit denying rehearing en banc 1a

TABLE OF AUTHORITIES

Cases

Arboleda v. U.S. Att'y Gen.,
434 F.3d 1220 (11th Cir. 2006) 7

Borovikova v. U.S. Dep't of Justice,
435 F.3d 151 (2d Cir. 2006) 8

Boumediene v. Bush,
128 S.Ct. 2229 (2008) 9

Chacon-Botero v. U.S. Att'y Gen.,
427 F.3d 954 (11th Cir. 2005) 4

Chen v. United States Dep't of Justice,
471 F.3d 315 (2d Cir. 2006) 10

Eman v. Holder,
No. 08-1317 (2009) 2

Fakhry v. Mukasey,
524 F.3d 1057 (9th Cir. 2008) 5, 6

Ferry v. Gonzales,
457 F.3d 1117 (10th Cir. 2006) 4

Ignatova v. Gonzales,
430 F.3d 1209 (8th Cir. 2005) 4

In re A-K-,
24 I. & N. Dec. 275 (BIA 2007) 7

In re D-I-M-,
24 I. & N. Dec. 448 (BIA 2008) 8

INS v. St. Cyr,
533 U.S. 289 (2001) 9, 12

Khan v. Holder,
No. 09-229,
pet. for certiorari filed, Aug. 20, 2009 3

Kourouma v. Mukasey,
No. 07-7726 2

Liu v. INS,
508 F.3d 716 (2d Cir. 2007) 10

Ornelas v. United States,
517 U.S. 690 (1996) 6, 11, 12

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 10, 11

Ramadan v. Gonzales,
479 F.3d 646 (per curiam),
reh'g en banc denied, 504 F.3d 973
(9th Cir. 2007) 4

Sukwanputra v. Gonzales,
434 F.3d 627 (3d Cir. 2006) 4

Usman v. Holder,
566 F.3d 262 (1st Cir. 2009) 4

Viracacha v. Mukasey,
No. 07-1363 (2008) 2

Statutes

8 U.S.C. 1252(a)(2)(D) ..... *passim*

Regulations

8 C.F.R. 1208.13(b)(2)(i)(B) 6

8 C.F.R. 1208.13(b)(3) 7

INTRODUCTION

The government does not dispute that there is a direct circuit split on the precise issue in this case: whether the term "questions of law" in 8 U.S.C. 1252(a)(2)(D) allows review of an asylum seeker's claim that she satisfied one of the statutory exceptions to the filing deadline. BIO 17 (acknowledging "disagreement in the courts of appeals").

The government also does not dispute that the circuits are splintered in both result and analysis, that the split is entrenched and longstanding, that eleven circuits have now ruled on the issue, and that further litigation in the lower courts will not eliminate the disagreement. Pet. 23-26.

The government likewise does not dispute that the precise jurisdictional issue has arisen in hundreds of asylum cases over the past few years. Pet. 22. *See also* Amicus Brief 2-4, 14 (brief by asylum experts noting the substantial number of cases). Nor does the government take issue with petitioner's observation that the courts of appeals have generally cited Section 1252(a)(2)(D) in over 1000 cases and have adopted conflicting interpretations of the term "questions of law." Pet. 23-29, 36-37.

Finally, the government does not claim that the Fourth Circuit failed to rule on the issue presented by the petition or that any other obstacle would prevent the Court from reaching the issue in

this case. In short, the government does not dispute that this case would allow the Court to reach a recurring and nationally-significant jurisdictional issue that has divided the courts of appeals for many years and has life and death consequences for asylum seekers.

Instead, the government argues that this case suffers from two vehicle problems: (1) petitioner did not brief the jurisdictional issue below and the Fourth Circuit's analysis was "relatively" short, and (2) petitioner may not have prevailed on the merits even if there had been jurisdiction. BIO 17-21. The government also argues that the Fourth Circuit's jurisdictional decision was correct. The government thus submits that the Court should deny the petition, as the Court has in other cases involving this issue. BIO 10-11 (citing cases).

The government's arguments in this case mirror its position in these prior cases. Although the government has consistently opposed review on vehicle grounds, it has previously acknowledged that the issue is an "important" one, BIO 5 in *Kourouma v. Mukasey*, No. 07-7726, and that the split "may warrant this Court's attention in an appropriate case." BIO 10 in *Eman v. Holder*, No. 08-1317 (2009); *see also* BIO 10 in *Viracacha v. Mukasey*, No. 07-1363 (2008) (same). But whatever vehicle problems may

have existed in these other cases, this case presents an especially suitable vehicle.[1]

ARGUMENT

I. THIS CASE PROVIDES AN IDEAL VEHICLE TO RESOLVE AN ENTRENCHED CIRCUIT SPLIT.

A. The Briefing And Length Of The Opinion Below Do Not Make This Case An Unsuitable Vehicle.

The government does not dispute that this Court routinely reviews cases where the issue was not briefed below, provided that the court passed on the question. Pet. 15 n.2 (citing cases).

The government also does not claim that the Fourth Circuit failed to address the issue. The Fourth Circuit received jurisdictional briefing from the government, directly ruled on the issue and also provided its rationale (that Ms. Gomis' claim was a "*discretionary determination* based on factual circumstances" and not a question of law). Pet. 10a-13a (emphasis in original). Moreover, the court of appeals acknowledged the circuit split, cited the leading circuit cases on the issue and specifically noted that the Ninth Circuit had adopted a conflicting view. Pet. 12a-13a (noting Ninth Circuit's view that the claim is a reviewable "mixed question of law and fact").

---

[1] The jurisdictional issue in this case is also presented in *Khan v. Holder*, No. 09-229, *pet. for certiorari filed*, Aug. 20, 2009.

The government argues, however, that this is an unsuitable vehicle because the Fourth Circuit's opinion was "relatively brief." But at the time of its ruling, the Fourth Circuit was the *eleventh* circuit to address the issue. There was thus little need for it to rehash the arguments.[2]

Nor is the Fourth Circuit's decision short in comparison to the lead decisions from most of the other circuits -- decisions on which the government relies heavily. BIO 10, 15-16. *See, e.g., Usman v. Holder*, 566 F.3d 262, 267 (1st Cir. 2009) (one-paragraph analysis); *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006) (two paragraphs); *Ignatova v. Gonzales*, 430 F.3d 1209, 1213-14 (8th Cir. 2005) (one paragraph); *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006) (one paragraph); *Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (two paragraphs).

In sum, the Fourth Circuit squarely addressed the issue and acknowledged the contrary authority. And because the Fourth Circuit was the eleventh court of appeals to address the question, this is not a situation where this Court will be without the benefit of the courts of appeals' thinking.

---

[2] The government suggests that the Fourth Circuit did not address certain arguments "presumably" because they were not briefed by petitioner. BIO 18. But all of these arguments were addressed in the Ninth Circuit's *Ramadan* decision, which the Fourth Circuit expressly chose not to follow. Pet. 13a.

B. Petitioner Would Likely Prevail On Her Asylum Claim.

1. The government speculates that petitioner would be unable to demonstrate changed circumstances on remand. The IJ and BIA, however, did not dispute that circumstances changed in Ms. Gomis' case, but rather concluded that the changes were not the type contemplated by the statute. Specifically, as the government acknowledges (at 19-20), the IJ and BIA concluded that Ms. Gomis had not satisfied the statute because the changes "simply confirm[ed] the preexistent risk" of FGM, and did not involve a different type of persecution. Pet. 44a (IJ). *See also* Pet. 30a (BIA) (stating that the statute was not satisfied because the original reason Gomis left Senegal was "to avoid the threat of FGM").

But, as *amici* asylum experts explain (14-18), the statute is satisfied where the likelihood of the same type of persecution occurring has increased. Notably, the only court of appeals to rule on this merits issue has rejected the government's position. *Fakhry v. Mukasey*, 524 F.3d 1057, 1062-64 (9th Cir. 2008).

Indeed, it would make little sense to require applicants to apply within a year even where they wished to return home and believed there was a chance they would be able to do so (or believed that the risk of harm at the time of the deadline was not legally sufficient). *Id.* at 1064 (asking why Congress would want to penalize an asylum seeker who chose not "to clog the immigration courts with a meritless

application" rather than waiting until asylum became necessary and viable); *id.* at 1063 ("a likely purpose of the [asylum] exception [is] to excuse late applications when an alien previously had a weak or nonexistent case for asylum").[3]

2. The government alternatively speculates (at 20-21) that petitioner's asylum application would be denied on the merits. Yet both the IJ and Fourth Circuit specifically acknowledged the risk of persecution if Ms. Gomis is returned to Senegal, and held only that she had not satisfied the "more likely than not" standard governing withholding. Pet. 17a, 46a; *see also* 8 C.F.R. 1208.13(b)(2)(i)(B) (requiring only a "reasonable possibility" of harm to satisfy asylum well-founded fear standard).

In fact, the Fourth Circuit divided evenly (5-5) on whether the evidence compelled the conclusion that Ms. Gomis satisfied the "more likely than not" standard governing *withholding*. *See* Pet. Reply 8a (dissent of 5 judges stating that "were [Gomis] to return to Senegal, there is no chance that she could escape circumcision").

---

[3] Contrary to the government's assertion (at 19-20), the IJ's determination would not survive "substantial evidence" review. More fundamentally, the government does not explain why that standard would apply if this Court concludes that petitioner raised a question of *law* under 8 U.S.C. 1252(a)(2)(D). *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699-700 (1996) ("*de novo*" review proper because the claim involved the application of law to fact).

Notably, the government does not claim that Ms. Gomis would be unable to satisfy the 10 percent well-founded fear standard if she were returned to her home. Pet. 4. Instead, citing cryptic statements made by the IJ, the government argues that the agency's decision might be upheld on the ground that Ms. Gomis could conceivably relocate within Senegal. BIO 20-21. But the BIA did not discuss relocation. Pet. 29a-30a. And even the IJ did not make an actual finding on relocation, which would have required the IJ to assess, among other things, whether relocating would avoid not only FGM but any other "serious harm," and whether there would be other "social and cultural constraints" in relocating. 8 C.F.R. 1208.13(b)(3). *See, e.g., Arboleda v. U.S. Att'y Gen.*, 434 F.3d 1220, 1226 (11th Cir. 2006).[4]

Furthermore, as the government recognizes (at 21), the IJ's vague statements on relocation appeared in the context of whether Ms. Gomis had met her burden as to *withholding* -- where the

---

[4] The government's reliance on *In re A-K-*, 24 I. & N. Dec. 275 (BIA 2007), is misplaced. BIO 21. The one-sentence of dicta in that case does not represent the Board's considered view that all women in Senegal can escape FGM and certainly does not bear on whether Ms. Gomis could relocate given her very different circumstances; indeed, in that case, the father would have *assisted* in his daughters' relocation. *Compare* Pet. 26a (Letter from Gomis' father stating: "I guarantee you that you'll not get from this situation.")

applicant must establish that it is *more likely than not* that she will be harmed. Pet. 46a.[5]

3. Finally, the government implies that petitioner's inability to apply for asylum is ameliorated by the fact that she was able to apply for withholding. BIO 10, 12. But asylum is the principal form of relief for refugees because, among other things, the applicant need only show a 10 percent likelihood of harm. Amicus Br. 2-4. That difference could not be more relevant here, where the Fourth Circuit divided 5-5 even under the "more likely than not" standard.[6]

---

[5] Insofar as the government is suggesting (at 21) that Ms. Gomis would have to satisfy the "more likely than not" standard as to relocation, that is patently incorrect and misreads the BIA's decision in *In re D-I-M-*, 24 I. & N. Dec. 448 (BIA 2008). Like other civil litigants, Ms. Gomis would simply have to show by a preponderance of the evidence that she satisfied the applicable *substantive* standard, which for asylum is the well-founded fear (*i.e.*, 10 percent) standard. *Cf. Borovikova v. U.S. Dep't of Justice*, 435 F.3d 151, 155-156 (2d Cir. 2006) (requiring applicant to show by "a *preponderance of the evidence* that he [has] . . . a *well-founded fear*'") (emphasis added). Indeed, any other rule would mean that an asylum applicant with a well-founded fear of persecution (*i.e.*, over 10 percent) could nonetheless be deported if the chance of harm was no greater than 50 percent in another part of the country. Not surprisingly, there is no federal court authority, or direct BIA support, for that proposition.

[6] The government also seems to imply (at 8) that Ms. Gomis may have acted improperly by not accepting voluntary departure. But Ms. Gomis understandably (and lawfully) chose to pursue her statutorily-authorized right to appeal, rather than voluntarily returning to a country where she fears FGM.

II. THE FOURTH CIRCUIT'S RULING WAS INCORRECT.

A. Section 1252(a)(2)(D) Covers The Application Of Law To Fact.

The government does not offer its own view of the scope of Section 1252(a)(2)(D). More significantly, the government does not directly dispute that Congress was concerned with avoiding Suspension Clause problems, that Section 1252(a)(2)(D) was intended to preserve the traditional scope of habeas review, or that habeas review has always encompassed claims involving the application of law to fact. Pet. 7-9, 29-31. In light of its failure to dispute these central points, the government's arguments have little force.

The government notes that *INS v. St. Cyr*, 533 U.S. 289 (2001), involved a "pure" question of law. BIO 14. But the government does not dispute that *St. Cyr* specifically recognized that habeas review has always included review of the proper "application" of the laws. 533 U.S. at 302. And the government wholly ignores that this Court subsequently reaffirmed *St. Cyr*'s analysis. *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) (quoting *St. Cyr*); Pet. 30-31 (citing additional authority).

The government also relies on a sentence in the Conference Report stating that courts can review the "legal" but not the "factual" aspects of a mixed question. BIO 14-15. But that says nothing about

whether a legal claim is limited to an artificial subset of pure legal claims. As the Report makes expressly clear, that question must be answered by reference to the traditional scope of habeas law. *See* Pet. 29-31.

Finally, the government states that Congress did not mean to alter "fundamentally" its 1996 decision to eliminate review of the asylum filing exceptions. BIO 13. But that was the precise purpose of Section 1252(a)(2)(D): to restore review of previously barred claims to the extent such review was traditionally available in habeas. *See* Pet. 7-9, 29-31; *Chen v. United States Dep't of Justice*, 471 F.3d 315, 326-27 (2d Cir. 2006) (finding jurisdiction over asylum exceptions to the extent available in habeas).[7]

B. Petitioner's Claim Involves The Application Of Law To Fact.

The government contends that petitioner's claim is unreviewable because it is factual and discretionary. Both contentions are wrong.

1. A claim involving the application of law to fact (a "mixed" question) is one where the "rule of law is undisputed," the "historical facts" are established, and the "issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*,

---

[7] The government's discussion of the circuit split (at 15-16) ignores the Second Circuit's intermediate approach to this issue. *See* Pet. 21-22; *Liu v. INS*, 508 F.3d 716, 721 (2d Cir. 2007).

456 U.S. 273, 289 n.19 (1982); *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996). Pet. 31-32.

Significantly, the government never argues that Ms. Gomis' claim fails to satisfy this well-settled definition. Nor could the government do so since Ms. Gomis does not challenge the adjudicated "historical facts" of her case and argues only that her "facts satisfy the statutory standard." *Pullman-Standard*, 456 U.S. at 289 n.19.

The government nonetheless argues that Ms. Gomis' claim is unreviewable because it involves a "fact-bound" dispute and the "applicable principles are undisputed." BIO 13. But Ms. Gomis' claim is necessarily "fact-bound" insofar as the issue is "whether the facts satisfy the statute." *Pullman-Standard*, 456 U.S. at 289 n.19. That is the very definition of a claim involving the application of law to fact. The government is thus wrong in arguing (at 13) that Ms. Gomis' claim is unreviewable because she "takes issue with the Board's holding that she failed to adduce facts sufficient" to satisfy the changed circumstances exception. Pet. 31-33.

As this Court has repeatedly explained, a legal standard will often be settled only at the most general level and will "acquire content only through application." *Ornelas*, 517 U.S. at 697. *See* Pet. 31-33. Here, the IJ and BIA properly recognized that, as a general matter, Ms. Gomis had to show changes relevant to her asylum eligibility. But, in applying the statute, the IJ and BIA concluded that the changes in Ms. Gomis' case were not sufficient under

the statute because they involved the same fear of FGM that originally led her to flee Senegal. Pet. 44a (IJ); Pet. 29a-30a (BIA). It is thus absolutely clear that this case turned on the meaning of the statute, as applied to the facts in Ms. Gomis' case. *Ornelas*, 517 U.S. at 697.[8]

2. The government also contends that the filing exceptions are *discretionary*, noting that the statute provides only that the Attorney General "may" excuse a late-filed application if the applicant satisfies the threshold statutory eligibility criteria (*i.e.*, changed or extraordinary circumstances). BIO 11. But the fact that a statute may vest the ultimate decision in the agency's discretion does not mean that the threshold statutory eligibility criteria are likewise discretionary and unreviewable. *St. Cyr*, 533 U.S. at 307-08 (finding jurisdiction to review statutory eligibility criteria despite the fact that the agency could ultimately deny the waiver as a matter of unreviewable discretion).[9]

Furthermore, in no sense did the IJ or BIA in this case make a subjective determination. Pet. 35 (citing cases involving definition of discretion). The

---

[8] Given these conceptual differences about the nature of mixed questions of law and fact, the government is incorrect that the significance of the jurisdictional issue in this case is limited to the asylum filing context. BIO 17 n.2. See Pet. 26-28.

[9] Petitioner has previously addressed the statute's use of the phrase "to the satisfaction," and the government has not responded to those arguments. Pet. 33-36.

IJ and BIA concluded that Ms. Gomis had not satisfied the statute because she still feared FGM, and not some other type of persecution. That was a legal determination about how to apply the statute: whether the "changed circumstances" exception enacted by Congress can be satisfied where the applicant demonstrates an increased risk of the same type of persecution occurring. It was not a discretionary (or factual) determination.

Finally the government is wrong that review of Ms. Gomis' claim would "convert every" claim into a question of law. BIO 13-14. Review of her claim in no way means that Ms. Gomis would be entitled to review of the historical facts or any ultimate discretionary authority the IJ may possess.

* * * *

Section 1252(a)(2)(D) is the linchpin of the Immigration Act's current judicial review scheme and has been cited in over 1000 cases since its 2005 enactment (including in over 350 *published* decisions). This case provides an ideal opportunity to address the conflicting interpretations of Section 1252(a)(2)(D) and to do so in the important context of asylum.

CONCLUSION

The petition should be granted.

Respectfully submitted,

LUCAS GUTTENTAG
CAROLINE CINCOTTA
American Civil Liberties
Union Foundation
39 Drumm Street
San Francisco,
California 94111
(415) 343-0770

Kell Enow
Enow & Associates
2470 Windy Hill Road
Marietta, Georgia 30067
(770) 956-8515

LEE GELERNT
Counsel of Record
STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
125 Broad Street,
18th Floor
New York, New York
10004
(212) 549-2500

CHARLES ROTH
National Immigrant
Justice Center
208 South LaSalle Street
Suite 1818
Chicago, Illinois 60604
(312) 660-1613

November 2009

APPENDIX

PUBLISHED

Filed: September 21, 2009

United States Court of Appeals
For the Fourth Circuit

FRANCOISE ANATE GOMIS,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

No. 08-1389

O R D E R

In a poll requested by a member of the Court on whether to rehear this case en banc, Judges Michael, Motz, King, Gregory, and Duncan voted to rehear this case, and Chief Judge Traxler, and Judges Wilkinson, Niemeyer, Shedd, and Agee voted to deny rehearing en banc. As a majority of active judges did not vote to rehear this case en banc, the poll failed.

Judge Niemeyer has written an opinion supporting the denial of rehearing en banc, and Judge Gregory has written an opinion dissenting from the denial of rehearing en banc.

Entered for the Court at the direction of Judge Niemeyer.

For the Court

/s/ Patricia S. Connor
Clerk

NIEMEYER, Circuit Judge, concurring in the denial of rehearing en banc:

Female genital mutilation is an abhorrent practice, and Senegal enacted a law in 1999 criminalizing it. Since then, the practice has been declining in Senegal, and the State Department's reports on Senegal state that female genital mutilation is now hardly practiced in populated areas, such as Dakar, where Francoise Gomis lived.

While Gomis gave her opinion that the practice was more prevalent than indicated in the State Department's reports, the administrative law judge chose to rely on the State Department's reports, concluding that Gomis was not attempting to be deceitful in giving her opinion but that she simply lacked "knowledge of the actual facts." At bottom, the judge concluded that Gomis had not established that it was more likely than not that she, as an educated adult, would be subjected to female genital mutilation upon return to Dakar, and the Board of Immigration Appeals (BIA) concurred.

On her petition for review of the BIA's decision, our role is not to make independent judgments on the facts but to defer to the agency's factfinding "unless any reasonable adjudicator would be *compelled* to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (emphasis added). On this record, we are not compelled to conclude to the contrary. The immigration judge had reliable facts on which to rest

his factfinding. Moreover, contrary to Judge Gregory's argument in his dissenting opinion, our earlier decision in *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007), does not compel a contrary factual finding in this case. That case was based on different facts in the context of a different country, Niger. Indeed, our reversal of the BIA's decision in *Haoua* was based on the immigration judge's speculation that the petitioner had a 10% chance of suffering female genital mutilation if she returned to Niger—a finding we concluded was not supported by the facts in the record—and on the government's concession that if the petitioner returned to her family in Niger, "her likelihood of suffering FGM would approach 100%." *Id.* at 232.

Our deferential role in this case is well defined, and it requires that we deny Gomis' petition for the reasons given in the panel opinion. In these circumstances, our decision not to rehear this case is appropriate, especially in view of the fact that Gomis did not herself seek a rehearing en banc.

GREGORY, Circuit Judge, dissenting from the order denying sua sponte rehearing en banc:

Under the current immigration system in this country, refugees from Sub-Saharan Africa are some of the most disadvantaged petitioners before our courts. They are the beneficiaries of very few rights which allow them to immigrate and seek the protection of our law.

There is, however, one basis for asylum that is clearly established in both this Circuit and the other federal courts: protection from female genital mutilation. *Barry v. Gonzalez*, 445 F.3d 741, 745 (4th Cir. 2006). This procedure involves anything from cutting off the clitoris with scissors to the shearing off of the entirety of the visible parts of the female sex organs with a knife and sewing them together using twine. *See* World Health Organization, *Female Genital Mutilation: A Handbook for Frontline Workers* 13 (2000). It is often done to either very young girls or as a puberty rite, but may occur at any time in a woman's life. Beyond the risks of surgery using unsterilized implements, many women experience severe infection, become outcasts when they develop incontinence after losing so much of their genitals, or have life-threatening difficulties with childbirth. World Health Organization et al., *Eliminating Female Genital Mutilation: An Interagency Statement* 11 (2008) (describing some of the harmful effects of female circumcision).

Both past female circumcision as well as the threat of future cutting have been held by this Circuit to qualify a female refugee for asylum in the United States, a recognition of the importance which our law attaches to the petitions of females seeking protection from this dangerous and excruciatingly painful practice. *Haoua v. Gonzalez*, 472 F.3d 227, 231-32 (4th Cir. 2007) (holding that the likelihood of the petitioner being subjected to female genital

mutilation upon her return to Niger qualified her for asylum). Our precedent has been clear in the standards by which we review eligibility for refugee status. This is why I felt compelled to call for an en banc poll in this case, as I believe the Court's opinion, *see Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), is blatantly contrary to well-settled, unquestioned circuit precedent.[1]

The predictability of precedent and an evenhanded application of the law in like cases are principles which guide our decisions in all cases before us. The precedent of this Circuit is for us, and only us, to police and maintain. Therefore, while I

---

[1] After our decision on the merits in this case, petitioner Gomis filed a petition for writ of certiorari at the Supreme Court on August 11, 2009. *Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3091 (U.S. Aug. 11, 2009) (No. 09-194). I sought an en banc poll on the forty-sixth day after our decision, giving the litigants the full time available to them to seek en banc review in this Court. This Court continues to exercise jurisdiction over the case and may rehear it en banc, pending the Supreme Court's decision on Ms. Gomis's petition for writ of certiorari. I am sure that she and her counsel would welcome the chance to be heard before the full circuit. I am of the opinion that this Court should "offer[ ] the Supreme Court whatever benefit this court can give it by rehearing a case en banc before the Court decides whether to grant a petition for writ of certiorari." *Messer v. Kemp*, 831 F.2d 946, 957 (11th Cir. 1987) (granting the Eleventh Circuit jurisdiction over a sua sponte rehearing en banc when the petitioner had already petitioned the Supreme Court for relief and the Supreme Court had issued an emergency stay of execution pending filing of the petition for certiorari).

hope that the Supreme Court will grant certiorari to consider Ms. Gomis's case, it cannot remedy the departure from settled precedent in our Circuit which this case represents. With all due respect to the majority, the reasoning contained therein is unsupported by precedent and makes no meaningful effort to distinguish the case from this Circuit's controlling decision in *Haoua v. Gonzalez*. It is my opinion that the paucity of distinguishing logic is because the facts in *Gomis* cannot be squared with that decision. In *Haoua*, the petitioner, a native of Niger, presented evidence that her family had given her to an elderly chieftain to be married and had performed the marriage ceremony in her absence while she was studying in the United States. 472 F.3d at 229-30. Per the customs of her tribe and as part of the marriage, she was required to undergo female genital mutilation. *Id.* at 230. This Court held that she had presented sufficient evidence for the Immigration Judge to find that she qualified for protection as a refugee. *Id.* at 232.

Similarly in this case, the petitioner testified that she was taken out of school by her parents and was to undergo female genital mutilation in order to marry a man in his sixties. *Gomis*, 571 F.3d at 355. She introduced evidence that after she fled to the United States, her father wrote her letters promising to use all means necessary to bring her back to Senegal and go through with the circumcision and marriage before his death. *Id.* at 364. Although my dissent to the Court's opinion sets out my reasoning

more fully, *see id.* At 362-65, it suffices to note here that with facts so similar in the two cases and a positive credibility finding for Gomis, *Haoua* should have dictated the outcome in this case. Indeed, the case here is stronger and the harm caused by an erroneous decision greater because Gomis's family made it clear that were she to return to Senegal, there is no chance that she could escape circumcision at their hands. Neither invocation of sympathy nor innovation in the law of asylum was necessary to grant Ms. Gomis's petition; it merely required the application of our precedent—simple justice.

Again, for the reasons stated in my dissent to the decision on the merits of Ms. Gomis's claim and in this opinion, I admit that I am concerned about the effect that allowing this precedent to stand will have on our consideration of the petitions of female refugees who seek protection from female genital mutilation. They deserve the protection of the *Haoua* precedent. I therefore must dissent.

Judge Michael, Judge Motz, Judge King, and Judge Duncan join in this dissent.

40

(2)

Supreme Court, U.S.
FILED
SEP 14 2009
OFFICE OF THE CLERK

No. 09-194

IN THE

Supreme Court of the United States

FRANCOISE ANATE GOMIS,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Corrected BRIEF OF HUMAN RIGHTS FIRST, THE CENTER FOR GENDER AND REFUGEE STUDIES & THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Alice Clapman
Center for Applied Legal Studies*
Georgetown University Law Center
600 New Jersey Ave., NW, Suite 332
Washington, DC 20001
(202) 662-9751

Steven Schulman
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

September 14, 2009

*Title listed for identification purposes

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
BRIEF AMICUS CURIAE 1
INTEREST OF THE AMICI 1
INTRODUCTION 2
ARGUMENT 5
I. THE CONGRESS THAT ENACTED THE ONE-YEAR DEADLINE FOR FILING ASYLUM APPLICATIONS BUILT EXCEPTIONS INTO THE DEADLINE BECAUSE CONGRESS UNDERSTOOD THAT MANY BONA FIDE REFUGEES FACE SPECIAL CIRCUMSTANCES PREVENTING THEM FROM APPLYING WITHIN A YEAR OF ENTERING THE UNITED STATES. 5
A. MANY REFUGEES ARE PREVENTED FROM FILING FOR ASYLUM WITHIN A YEAR OF ENTERING THE UNITED STATES. 6
B. RECOGNIZING THIS REALITY, CONGRESS DESIGNED TWO EXCEPTIONS—FOR EXTRAORDINARY CIRCUMSTANCES AND FOR CHANGED CIRCUMSTANCES—THAT WERE INTENDED TO BE BROAD AND TO ENSURE CONTINUED ACCESS TO ASYLUM. 9
II. IN PRACTICE, MANY AGENCY ADJUDICATORS HAVE NARROWED THE STATUTORY EXCEPTIONS TO SUCH A DEGREE THAT THEY DO NOT ADEQUATELY PROTECT REFUGEES 13
A. OVERLY NARROW CONSTRUCTION OF "CHANGED CIRCUMSTANCES" 13
B. IMPROPER ANALYSIS OF POST TRAUMATIC STRESS DISORDER CASES. 17

C. OTHER ERRORS 22
III. JUDICIAL OVERSIGHT IS NECESSARY TO RESTORE THE STATUTORY EXCEPTIONS TO THEIR PROPER SCOPE 23
CONCLUSION 25
APPENDIX
LIST OF AMICI CURIAE 1a

TABLE OF AUTHORITIES

Cases

Benslimane v. Gonzales,
430 F.3d 828 (7th Cir. 2005) 24, 25

Cao He Lin v. U.S. Dept. of Justice,
428 F.3d 391 (2d Cir. 2005) 24

Fakhry v. Mukasey,
524 F.3d 1057 (9th Cir. 2008) 15

Gebreeyesus v. Gonzales,
482 F.3d 952 (7th Cir. 2007) 24

I.N.S. v. Cardoza-Fonseca,
480 U.S. 421 (1987) 2, 24

Kanivets v. Riley, 320 F. Supp. 2d 297 (E.D. Pa. 2004) *appeal dismissed as moot on other grounds sub nom. Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005) 17

Li v. U.S. Atty. Gen.,
488 F.3d 1371 (11th Cir. 2007) 24

Negusie v. Holder
129 S. Ct. 1159 (2009) 24

Pet. for Writ of Certiorari, *Viracacha*, 129 S. Ct. 451 (No. 07-1363) 15

Poradisova v. Gonzales,
420 F.3d 70 (2d Cir. 2005).....24

Shardar v. Attorney General of U.S.,
503 F.3d 308 (3d Cir. 2007).....24

Sukwanputra v. Gonzales,
434 F.3d 627 (3d Cir. 2006).....17

Viracacha v. Mukasey,
518 F.3d 511 (7th Cir. 2008),
cert. denied, 129 S.Ct. 451 (2008) 14, 15

Statutes

8 U.S.C. § 1101(a)(42).....2

8 U.S.C. § 1158(a)(2)(D).....10, 15

8 U.S.C. § 1159(b) 4

8 U.S.C. § 1231(b)(3).....4

8 U.S.C. § 1252(a)(2)(D).....3

International Agreements

U. N. Convention Relating to the Status of
Refugees, July 28, 1951, 19 U.S.T. 6259,
189 U.N.T.S. 150 .....2, 23

U. N. Protocol Relating to the Status of
Refugees, Jan. 31, 1967, 19 U.S.T. 6223,
606 U.N.T.S. 2678 .....2, 23

UNHCR Executive Committee, Conclusion No. 15 (XXX), Refugees Without an Asylum Country (1979) 23

Regulations

8 C.F.R. § 208.4(a)(4)(i)(B) 16

8 C.F.R. § 208.4(a)(4), (a)(5) 12

8 C.F.R. § 208.4(a)(5)(i) 18

8 C.F.R. § 1208.21 4

Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 62,284 (Dec. 5, 1994) 5

Legislative History

142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) 10, 16, 18

142 Cong. Rec. S11839-40 (daily ed. Sept. 30, 1996) 10, 11

142 Cong. Rec. S3282 (daily ed. Apr. 15, 1996) 9

142 Cong. Rec. S4468 (daily ed. May 1, 1996) 5, 6

Legislative Materials

Homeland Security Act, Pub. L. No. 107-296 § 471, 116 Stat. 2135 (2002) 12

Refugee Act of 1980, Pub. L. (1980) 2, 8

Other Authorities

Adam Liptak, *Courts Criticize Judges' Handling Of Asylum Cases*, N.Y. Times, Dec. 26, 2005 25

Department of Justice, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (2001), *available at* http://trac.syr.edu/immigration/reports/194/include/Gonzales22ImprovementMeasures.pdf..... 25

Diagnostic Manual, American Psychiatric Association, 309.81 Posttraumatic Stress Disorder (2000)..... 18, 19

Immigration Courts: Still A Troubled Institution, *available at* http://trac.syr.edu/immigration/reports/210/..... 25

Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l & Comp. L. Rev. 693, 716-17 (2008).....passim

Lawyers Committees for Human Rights (now Human Rights First), *Refugee Woman at Risk* (2002), *available at* http://www.humanrightsfirst.org/refugees/reports 7

Leena Khandwala et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, Immigration Briefings, (Aug. 2005) 8

Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, 10 Geo. Immigr. L.J. (1996) 8, 23

Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 Geo. Immigr. L.J. (2001) 7, 8

Philip G. Schrag, *A Well Founded Fear: The Congressional Battle to Save Political Asylum in America* (2000) 5

Posttraumatic Stress Disorder Patient Page, 286 JAMA (2001) 18, 19

Stuart L. Lustig, *Symptoms Of Trauma Among Political Asylum Applicants: Don't Be Fooled*, 31 Hastings Int'l & Comp. L. Rev. (2008) 7, 18

IN THE

Supreme Court of the United States

FRANCOISE ANATE GOMIS,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE

INTEREST OF THE AMICI[1]

Amici are human rights organizations, legal services organizations, mental health service providers, immigration clinical programs, and law school professors, all of whom advocate for or work with refugees or are experts in asylum law and policy in their professional capacities. *See* App., *infra*. *Amici* are filing this brief in support of the petitioner to bring to the Court's attention the impact the one-year asylum filing deadline can have on *bona fide* asylum applicants.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

INTRODUCTION

The United States has a strong tradition of welcoming the persecuted. In the wake of World War II, this country played a leading role in building an international refugee protection regime to ensure that the world's nations would never again refuse to extend shelter to refugees fleeing persecution and harm. It has committed to the central guarantees of the 1951 Refugee Convention and its 1967 Protocol, and passed the Refugee Act of 1980 in order to bring domestic laws into compliance with the Refugee Convention and Protocol by incorporating the Convention's definition of a "refugee" and the protections that flow from this status.[2]

At stake in this case is the continued availability of asylum to a significant number of refugees who are erroneously being subjected to the recently-enacted one-year bar when they should qualify for an exception. Unless this Court overturns the decision

---

[2] *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432-41 (1987) (recounting legislative history). Under United States law, a "refugee" is, in relevant part, a person who is outside his or her country of nationality or habitual residence and "is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). The statutory definition was adapted from the 1951 United Nations Convention Relating to the Status of Refugees, to which the United States became a party in 1968 by signing the 1967 Protocol. 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150; 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

below, Francoise Anate Gomis will be returned to a country where she is acknowledged to be in danger of being subjected to female genital mutilation (FGM); she will be returned because an Immigration Judge decided that she could not be excused for filing out of time even though she presented new facts that heightened the risk that she would be mutilated (and therefore significantly strengthened her eligibility for asylum).

Amici will not repeat Petitioner's central argument that 8 U.S.C. § 1252(a)(2)(D) confers jurisdiction to review agency applications of the one-year asylum deadline to undisputed facts. Instead, *amici* explain from their own experience why judicial review of one-year deadline determinations is necessary—to ensure that refugees are not improperly denied asylum or deported back to countries where they face political, religious and other forms of persecution. When Congress enacted the one-year asylum deadline in 1996, it did so because it perceived that some non-refugees placed in removal proceedings were abusing the system by applying for asylum as a delaying tactic. To preserve asylum for the many *bona fide* refugees with good reason for failing to apply within a year of entry, Congress provided two broad exceptions to the deadline: one for extraordinary circumstances and one for changed circumstances.

Congress intended these two exceptions to be applied broadly so as to protect legitimate refugees. Unfortunately, in the years since the deadline was enacted, a number of Immigration Judges (IJs) and Board of Immigration Appeals (BIA) members have drastically narrowed the exceptions, with disastrous consequences for refugees. As the one-year deadline

is now being applied, refugees such as Ms. Gomis are routinely being returned to countries where they are in danger of persecution. Others, if they happen to meet the significantly heightened standard for withholding of removal, are being afforded only the limited right not to be returned to the country where they would face persecution; they are not protected from removal to other countries or allowed to become permanent residents, and most importantly they can never reunite with their families by bringing them to safety in the United States.[3] Without judicial review, these refugees have no hope of obtaining the protection of the asylum law as written.

Amici hope that their description of the actual situation at the agency level—and the contrast between this current situation and Congress's original intent—will provide further impetus for this Court to consider Ms. Gomis's jurisdictional arguments.

---

[3] *Compare* 8 U.S.C. § 1159(b) (affording asylees the opportunity to apply for permanent resident status) *and* 8 C.F.R. § 1208.21 (providing derivative benefits for the spouse and children under 21 of asylees), *with* 8 U.S.C. § 1231(b)(3) (offering sole protection for withholding grantees: the right not to be returned to a country where that person's "life or freedom would be threatened" on account of a protected ground).

ARGUMENT

I. THE CONGRESS THAT ENACTED THE ONE-YEAR DEADLINE FOR FILING ASYLUM APPLICATIONS BUILT EXCEPTIONS INTO THE DEADLINE BECAUSE CONGRESS UNDERSTOOD THAT MANY BONA FIDE REFUGEES FACE SPECIAL CIRCUMSTANCES PREVENTING THEM FROM APPLYING WITHIN A YEAR OF ENTERING THE UNITED STATES.

Congress enacted the one-year deadline in 1996 because it perceived that some migrants without genuine and viable claims to protection were abusing the asylum process by applying defensively as a means of delaying their removal.[4]

As Congress considered how to deter baseless claims, however, it also recognized that there are a number of reasons why some *bona fide* refugees might be prevented from applying for asylum immediately after entering the country. Members made clear that they did not want to shut these

---

[4] *See* 142 Cong. Rec. S4468 (daily ed. May 1, 1996) (Former Senator Alan K. Simpson (R-WY), one of the sponsors of the deadline, explaining "We are not after the person from Iraq, or the Kurd, or those people. We are after the people gimmicking the system"). *See also* Philip G. Schrag, *A Well Founded Fear: The Congressional Battle to Save Political Asylum in America* 47-48 (2000) (describing origins of deadline). The former Immigration and Naturalization Services also launched a set of major reforms to eliminate a substantial backlog that had allowed many asylum cases to languish for years. *See* Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 62,284 (Dec. 5, 1994).

refugees out from the relief of asylum.[5] To prevent such an injustice, Congress devised two broad exceptions to the deadline: for extraordinary circumstances and for changed circumstances.

A. Many refugees are prevented from filing for asylum within a year of entering the United States.

For a number of reasons, many *bona fide* refugees find themselves unable to apply for asylum immediately after entering the United States. To apply for asylum, a refugee who has suffered must be able psychologically to relive past trauma—by describing and discussing it over and over again, in writing and in person, with a representative, with potential witnesses or other sources of corroboration, and with an asylum officer and/or judge. She may have to find someone to help her present her facts, often a lawyer. She also must learn about the law and rules, procedural and substantive. She must be able to fill out a complex, 10-page English-language application form. She has to track down colleagues, co-workers or other contacts in her home country, as well as supporting documents, to satisfy a demanding standard of corroboration. She must translate all her evidence into English. She needs to juggle all this work involved in the asylum process with finding a home, coping with physical and/or psychological wounds, finding means of support (usually without permission to work), caring for her family, and

---

[5] *See* 142 Cong. Rec. S4468 (statement of Sen. Simpson).

learning the language and customs of a new country.[6] And she must judge whether the danger she faces is sufficient to support an asylum claim (a particular challenge where the situation at home is volatile).

In light of these demands, it understandably takes some length of time, sometimes more than a year, for *bona fide* refugees to file their application. Those who have been subjected to past persecution and/or torture often bear severe psychological wounds that diminish their ability to face their past or plan for the future; they may only be able to do so with the distance of time and/or with long-term improvements from mental health treatment.[7] Those who were subjected to sexual abuse or other forms of degradation in their home countries may be struggling to overcome their shame and/or difficulty describing such incidents, whether personal, social or cultural.[8] Refugees from countries in which the government monitors the mails and wires may delay gathering corroboration from relatives in their

---

[6] *See* Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 Geo. Immigr. L.J. 1, 8-9 (2001); *see also* Lawyers Committee for Human Rights (now Human Rights First), *Refugee Women at Risk* 15-16 (2002), *available at* http://www.humanrightsfirst.org/refugees/reports/refugee_women.pdf (detailing some of the particular challenges faced by women refugees as a result of the asylum filing deadline).

[7] *See* Stuart L. Lustig, *Symptoms Of Trauma Among Political Asylum Applicants: Don't Be Fooled*, 31 Hastings Int'l & Comp. L. Rev. 725, 729 (2008) (explaining that, among PTSD patients, "[j]ust recounting the story is enough to trigger uncontrollable tears, panic attacks, or flashbacks of the event").

[8] *See* Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l & Comp. L. Rev. 693, 716-17 (2008).

country of origin out of the reasonable fear that such contacts could place their relatives in danger of persecution. Others may be overwhelmed with providing food and shelter for their families or caring for sick family members (or coping with their own sicknesses or injuries). Still others hope that the situation at home will improve while they temporarily reside in the United States, only to find that the situation persists or even worsens over an extended period of time. And some may run afoul of the deadline while trying to obtain legal assistance or documentary corroboration.[9]

A refugee has little or no control over these kinds of situations. Moreover, these circumstances do not in any way undermine the substantive validity of an individual's asylum claim. To the contrary, some of them are *the direct effects* of past persecution and therefore affect those most deserving of protection under the U.S. Refugee Act. It is not surprising, then, that in the years before the one-year deadline was enacted, fewer than half of the *successful* asylum applicants represented by *pro bono* attorneys working with Human Rights First (then the Lawyers Committee for Human Rights) had applied within their first year in the United States.[10]

---

[9] *See id.*, at 715-16; Leena Khandwala et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, Immigration Briefings, Aug. 2005, at 4; Michele R. Pistone, *Asylum Filing Deadlines: Unfair and Unnecessary*, 10 Geo. Immigr. L.J. 95, 100-101 (1996).

[10] *See* Pistone & Schrag, *supra* note 5, at 9.

B. Recognizing this reality, Congress designed two exceptions—for extraordinary circumstances and for changed circumstances—that were intended to be broad and to ensure continued access to asylum.

Congress recognized the reality described above. As Senator Edward Kennedy (D-MA) explained in his speech supporting the amendment to extend a proposed 30-day deadline to one year,

> The bottom line is that the cases where there appears to be the greatest validity of the persecution claims—the ones involving individuals whose lives would be endangered by a forced return to their particular countries—are often the most reluctant to come forward. They are individuals who have been, in the most instances, severely persecuted. They have been brutalized by their own governments. They have an inherent reluctance to come forward and to review their own stories before authority figures. Many of them are so traumatized by the kinds of persecution and torture that they have undergone, they are psychologically unprepared to be able to do it. It takes a great deal of time for them to develop any kind of confidence in any kind of legal or judicial system, after what they have been through, and to muster the courage to come forward.[11]

---

[11] 142 Cong. Rec. S3282 (daily ed. Apr. 15, 1996) (statement of Sen. Kennedy).

For similar reasons, Senator Orrin Hatch (R-UT), who strongly advocated the one-year deadline, nonetheless acknowledged that "adequate protections" were necessary[12] and stressed that he was "committed to ensuring that those with legitimate claims of asylum are not returned to persecution, particularly for technical deficiencies."[13]

To reduce the risk that the one-year bar would lead to the denial of asylum to refugees, Congress included two independent exceptions: 1) "changed circumstances which materially affect the applicant's eligibility for asylum"; and 2) "extraordinary circumstances relating to the delay in filing an application within the [prescribed] period."[14] Two Senators instrumental in the passage of the one-year deadline, Senators Hatch (who was one of the conferees) and former Senator Spencer Abraham (R-MI), engaged in a colloquy in which they repeatedly described these exceptions as "important" and endorsed a broad construction of them:

> Mr. ABRAHAM.
>
> Would you say that the intent in the changed circumstances exception is to cover a broad range of circumstances that may have changed and that affect the applicant's ability to obtain asylum?
>
> Mr. HATCH.

---

[12] 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

[13] 142 Cong. Rec. S11840 (daily ed. Sept. 30, 1996) (pre-vote colloquy between Sen. Abraham and Sen. Hatch).

[14] 8 U.S.C. § 1158(a)(2)(D).

> Yes. That exception is intended to deal with circumstances that changed after the applicant entered the United States and that are relevant to the applicant's eligibility for asylum. The changed circumstances provision will deal with situations like those in which the situation in the alien's home country may have changed, the applicant obtains more information about likely retribution he or she might face if the applicant returned home, and other situations that we in Congress may not be able to anticipate at this time. [15]

As to the extraordinary circumstances exception, Senator Hatch explained:

> [T]he extraordinary circumstances exception applies to reasons that are, quite literally, out of the ordinary and that explain the alien's inability to meet the 1-year deadline. Extraordinary circumstances excusing the delay could include, for instance, physical or mental disability, unsuccessful efforts to seek asylum that failed due to technical defects or errors for which the alien was not responsible, and other extenuating circumstances.[16]

Shortly after the one-year deadline was enacted, the then-Immigration and Naturalization

---

[15] 142 Cong. Rec. S11839-40 (daily ed. Sept. 30, 1996) (pre-vote colloquy between Sen. Abraham and Sen. Hatch).

[16] *Id.*

Services (INS) [17] promulgated implementing regulations. According to the regulations, "changed circumstances" "may include, but are not limited to . . . [c]hanges in conditions in the applicant's country of nationality," as well as "[c]hanges in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk." "Extraordinary circumstances" "may include but are not limited to . . . [s]erious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival," "[i]neffective assistance of counsel," and the rejection of a timely application for technical defects.[18]

The "changed circumstances" and "extraordinary circumstances" exceptions to the one-year deadline, as drafted by Congress and implemented by the INS, were the lynchpins to balance enforcement objectives with fairness. They were intended to allow the government to deter baseless applications while protecting genuine refugees in situations that justified their failure to file within a year of arrival. Unfortunately, agency practice has upset this balance, favoring enforcement with little consideration of fairness.

---

[17] Pursuant to the Homeland Security Act of 2002, the former INS was abolished and its functions transferred to several different agencies within the Department of Homeland Security. Pub. L. No. 107-296, § 471, 116 Stat. 2135 (2002).

[18] 8 C.F.R. § 208.4(a)(4), (a)(5).

II. IN PRACTICE, MANY AGENCY ADJUDICATORS HAVE NARROWED THE STATUTORY EXCEPTIONS TO SUCH A DEGREE THAT THEY DO NOT ADEQUATELY PROTECT REFUGEES

Despite the clear evidence that Congress intended for the deadline exceptions to be applied broadly and the expansive language of the agency regulations, many IJs and BIA members have applied the exceptions so narrowly that they no longer protect the refugees Congress intended to safeguard.

Since the deadline was enacted, tens of thousands of applications have been rejected as untimely.[19] Thus a statutory measure originally meant to discourage fraud at the margins has come to be applied in such a way that it is now one of the principal grounds on which asylum is denied. Many *amici*, as practitioners, have encountered legal errors in how IJs, and the BIA in its cursory review, apply the statutory exceptions. The following sections will discuss several of these in turn.

A. Overly narrow construction of "changed circumstances"

The first type of error concerns the "changed circumstances" exception, and the degree or type of change that it requires. Contrary to the statute, the legislative history and the regulations, adjudicators have excluded applicants such as Ms. Gomis from

---

[19] *See* Musalo & Rice, *supra* note 7, at 698-99. (citing statistics from the asylum office). EOIR does not provide statistics concerning application of the one-year deadline.

this exception solely because the new evidence they presented went to a fear they already had when they had entered the United States. In Ms. Gomis' case, the IJ reasoned that the fact that Ms. Gomis' sister had recently been subjected to FGM could not constitute "changed circumstances" because it "simply confirms the preexistent risk of persecution she claims she had when she arrived here in the United States." [20] The BIA, by single-member affirmance, summarized the IJ as having found no "changed circumstances" because the risk of FGM was "the entire reason the respondent claims to have left Senegal in 2001."[21] In other words, in the IJ's view, because Ms. Gomis fled Senegal out of fear of FGM, *no* new evidence indicating a heightened danger of FGM, no matter how compelling, could possibly be a changed circumstance material to her eligibility for asylum.

Similarly, in the case of *Viracacha v. Mukasey*,[22] the IJ had held that an applicant who feared persecution by the Revolutionary Armed Forces of Columbia (FARC) could not establish changed circumstances justifying late filing because the changes he cited—i.e., the breakdown of the peace process between the FARC and the Columbian government and the resumption of civil war—had not "changed the circumstances in such a way as to cause a new situation to exist, one that hadn't existed during the period in which the respondent was

---

[20] Pet. App. 44a.

[21] Pet. App. 30a.

[22] 518 F.3d 511 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 451 (2008).

obligated to file."[23] In the IJ's mind, there was simply no material difference between a potential claim during a period of uneasy peace and an actual claim brought during an active civil war. The Court of Appeals for the Seventh Circuit found that it lacked jurisdiction to review such an error.[24]

In *Fakhry v. Mukasey*,[25] in which the IJ again denied asylum based on the same reasoning, the Court of Appeals for the Ninth Circuit held that such analysis was incorrect. Specifically, the court explained that the IJ's focus on the applicant's original motivation for fleeing his country overlooked that asylum eligibility is based on two elements: subjective fear and an objective basis for that fear. Because worsened conditions can increase the applicant's subjective fear as well as augment the objective basis for that fear, they fit the statutory standard of "materially affect[ing] the applicant's eligibility for asylum."[26] The court added that the IJ's rule would have the perverse effect of penalizing individuals who, not wanting to file a frivolous asylum application, waited to file until conditions in their country clearly supported an application.[27]

Yet another reason why the IJs' logic fails in these cases is that the regulations themselves extend the "changed circumstances" exception to changes in United States *law* "that materially affect the

---

[23] Petition for Writ of Certiorari, *Viracacha*, 129 S.Ct. 451 (No. 07-1363), *available at* 2008 WL 1906208 (quoting the IJ decision).

[24] *Viracacha*, 518 F.3d at 516.

[25] 524 F.3d 1057 (9th Cir. 2008).

[26] 8 U.S.C. § 1158(a)(2)(D); *Fakhry*, 524 F.3d at 1063.

[27] *Fakhry*, 524 F.3d at 1063-64.

applicant's eligibility for asylum," thereby making clear that the key issue is not whether the applicant has a new reason to fear persecution but rather whether the grounds of his *eligibility* have changed.[28] The restrictive IJ construction also contravenes legislative intent. In pre-vote floor remarks and colloquy, Senator Hatch assured his colleagues that the changed circumstances provision would "deal with," inter alia, situations "in which an alien's home government may have *stepped up* its persecution" or where an "applicant may have become aware through reports from home or the news media just *how* dangerous it would be for the alien to return home."[29] Senator Hatch's language squarely contradicts the view of "changed circumstances" as requiring the existence of a new and different basis for the asylum claim, or some wholly new *form* of danger.

Under the current circuit split on the jurisdictional question, applicants in the Ninth Circuit can seek relief from this serious and outcome-determinative (indeed, in many cases, life-and-death) error, while applicants elsewhere such as Ms. Gomis and Mr. Viracacha generally cannot. *Amici* are aware of many other cases in which refugees were denied relief based on the same error; for example, a Russian woman was granted withholding based on her homosexual orientation but barred from asylum for late filing even though she filed shortly after learning that her same-sex partner had been raped and beaten to the point of mental incapacitation,[30]

---

[28] 8 C.F.R. § 208.4(a)(4)(i)(B).

[29] 142 Cong. Rec. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch) (emphasis added).

[30] Musalo & Rice, *supra* note 7, at 701.

and a Kyrgyzstani applicant fearing religious persecution was barred from asylum even though he decided to apply shortly after receiving a visit from his mother and learning from her that anti-Semitism was worsening in Kyrgyzstan.[31]

As set forth above, it is evident from the legislative history that Congress never intended for IJs to be applying the bar in such a tortured way. What Congress intended was to allow refugees to file out-of-time if the conditions worsened in their country of origin or if their own situation changed in such a way as to put them at greater risk (and therefore more likely to be found eligible for asylum)—regardless of whether the "essential nature" of the risk was the same or new. Judicial oversight is necessary to restore this exception to its intended scope.

B. Improper Analysis of Post Traumatic Stress Disorder Cases

Many IJs also err in how they consider post-traumatic mental disorders under the "extraordinary circumstances" exception. The legislative history shows that delays due to mental disorders were foremost among the circumstances that Congress intended to cover through the "extraordinary

---

[31] *Kanivets v. Riley*, 320 F. Supp. 2d 297 (E.D. Pa. 2004), *appeal dismissed as moot on other grounds sub nom. Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005). The Third Circuit generally has held that courts lack jurisdiction to review one-year deadline determinations. *Sukwanputra v. Gonzales*, 434 F.3d 627, 635 (3d Cir. 2006).

circumstances" exception to the one-year deadline.[32] At the time the provision was enacted, the Immigration and Naturalization Services recognized this fact by drafting a regulatory provision requiring adjudicators to consider "mental disability," particularly "any effects of persecution or violent harm suffered in the past."[33] Nonetheless, many applicants are barred from asylum because their IJs conclude—against the consensus of the medical establishment—that anyone who was able to perform some basic functions during the first year of her presence in the United States could therefore have filed for asylum in a timely manner.

According to the American Medical Association and the American Psychiatric Association, individuals suffering from post-traumatic stress disorder (PTSD) habitually avoid "people, places, thoughts, or activities that bring back memories of the trauma."[34] A person suffering from PTSD, then, may be functional in everyday life yet unable to apply for asylum because applying would require her to engage in the very activity that triggers her panic responses: remembering the past trauma, discussing it repeatedly with their lawyer, testifying, trying to recover details with sufficient specificity to satisfy the adjudicator, going over these details again and again

---

[32] *See* 142 Cong. Rec. S11491-02 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch) (describing the exception as including "physical or mental disability").

[33] 8 C.F.R. § 208.4(a)(5)(i).

[34] Posttraumatic Stress Disorder Patient Page, 286 JAMA 630, 630 (2001). *See also* Diagnostic Manual, American Psychiatric Association, 309.81Posttraumatic Stress Disorder (2000); Lustig, *supra* note 7, at 731-32 (2008).

as others probe potential inconsistencies.[35] To get to a point where she can discuss the trauma without reliving it, she may need time and/or intensive treatment.

Unfortunately, *amici* have encountered numerous cases where the IJ declined to find exceptions to the one-year bar based on his or her own mistaken intuitions about post-traumatic behaviors rather than the expert testimony or medical literature. For example, a Guatemalan domestic violence victim presented evidence of PTSD suffered as a result of her abuse. However, because the applicant had maintained employment and paid her bills since her arrival in the United States, the IJ concluded that her PTSD could not have prevented her from meeting the filing deadline. The IJ denied asylum and granted relief under the Convention Against Torture and withholding of removal instead.[36] The paradox of such a ruling is that these latter forms of relief require a showing of a greater risk of harm than does asylum.

In another case, the IJ applied the deadline to a Kenyan applicant and barred her asylum application, despite a psychologist's evaluation diagnosing her with PTSD and Major Depressive Disorder (MDD), simply because the applicant had managed to join and regularly attend a church during her first year in the United States.[37] Some applicants have been subjected to the one-year bar because they continue

---

[35] *See id.*

[36] Musalo & Rice, *supra* note 7, at 700.

[37] *Id.* at 704.

to suffer from the same disorder that earlier prevented them from filing.[38]

Two particularly egregious cases, described in *The Implementation of the One-Year Bar to Asylum*, bear recounting in detail:

> A Kenyan woman whose mother and grandmother helped her escape FGC [female genital cutting] as a child. She was subsequently forced to marry a man with three other wives. While raping her to punish her for failing to conceive, her husband discovered she had not undergone FGC. When her husband and tribal elders attempted to subject her to FGC, the applicant attempted suicide. She was unconscious and hospitalized for four months. When she recovered her husband beat and raped her again. . . . The applicant fled to the U.S. on a tourist visa and applied for asylum after the one-year deadline had passed. The IJ accepted her diagnosis of PTSD but rejected her contention that it was directly related to her delay in filing. The IJ reasoned that the applicant had exhibited "entrepreneurial skills" by caring for children to raise money while she was homeless and isolated, and because her pro se application was well written and articulate.
>
> ...

---

[38] *Id.*

> An Albanian teenager who was kidnapped by a trafficker, held captive, and raped and battered while plans were made to traffic her into prostitution. The adolescent escaped but could not return home for fear of being recaptured. She fled to the United States, entered as an unaccompanied minor, and applied for asylum 13 months after entering the country (and while still a minor). In immigration court, she presented the testimony of a clinical psychologist who diagnosed the applicant with PTSD and MDD. The clinical psychologist testified that the applicant's psychological conditions prevented her from speaking about the trauma she had been subjected to. Despite this expert testimony, the IJ concluded that the applicant could easily have rectified her feelings of shame by seeking out an attorney. The BIA dismissed the young woman's appeal.[39]

There is nothing in the statute or legislative history that suggests Congress intended for IJs, when deciding whether to excuse a late filing, to be parsing the degree of trauma experienced by individuals who suffered years of continuous rape, beating and imprisonment to the point where they attempted suicide and nearly succeeded, or by minors who suffered rape, imprisonment and beating.

---

[39] Musalo & Rice, *supra* note 7, at 704-05.

C. Other errors

In addition to the two key errors listed above, *amici* routinely encounter and are aware of other unduly restrictive applications of the exceptions to the one-year deadline. For example, one IJ applied the bar to an applicant who argued that she had been consumed with caring for her terminally ill minor child while living in a shelter,[40] and another IJ applied the bar to an Afghani woman who bore two children out of wedlock while living in the United States and feared persecution on account of her new status as a single mother.[41]

Because a significant number of those denied asylum instead receive withholding, one result of these unduly restrictive applications of the law is a growing class of refugees who are living in the United States without any hope of ever assuming the rights and obligations of citizenship in their adopted country.[42] There is no evidence that, when it set out

---

[40] *Id.* at 708.

[41] *Id.* at 709. The applicant was granted withholding of removal. *Id.*

[42] Musalo & Rice, *supra* note 7, at 721. Another source of this growth, and another development Congress could not have intended or even foreseen, is the DHS practice in some regions of pressuring refugees into "settlements" in which they withdraw their asylum claim in return for a promise of withholding of removal (or relief under the Convention Against Torture). *See id.* at 719-21 (providing examples). As a substantive legal matter, this practice makes no sense. An applicant who meets the stringent "more likely than not" test for withholding clearly would have qualified for asylum but for the one-year deadline problem and may well merit exemption from the deadline (e.g., based on PTSD). Moreover, because withholding grantees unlike asylees are not allowed to bring

to curtail asylum fraud and clear away backlogs while protecting *bona fide* refugees, Congress intended this effect.

III. JUDICIAL OVERSIGHT IS NECESSARY TO RESTORE THE STATUTORY EXCEPTIONS TO THEIR PROPER SCOPE

Without judicial review, the errors outlined above will continue, and the United States will continue to deny asylum to the very victims of persecution Congress intended to protect and deport some of them to back to the country where they face a threat of persecution.[43]

---

their family over, the human consequences of these plea bargains are disastrous. Many asylum seekers fled in great haste, and traveled to the U.S. under hazardous conditions to which they would not have wanted to subject their minor children. These individuals are forced to choose between their fear of persecution and, on the other hand, their desire to reunite with the family left behind and to rescue them from danger.

[43] In addition, narrow construction of the one-year deadline runs contrary to U.S. commitments to protect refugees from *refoulement* under the Refugee Convention and Protocol, as well as customary international law. *See* UNHCR Executive Committee, Conclusion No. 15 (XXX), Refugees Without an Asylum Country (1979) at (i) (formally stating that "failure to [file within a certain time limit], or the non-fulfillment of other formal requirements, should not lead to an asylum request being excluded from consideration"); Pistone, *supra* note 8, at 103 (quoting Letter from UNHCR representative to Chair of the House Judiciary Committee, which expressed fear that the filing deadline and other provisions "will have a grave impact on the ability of the United States to offer protection to those fleeing from persecution."). The United States is a member of the Executive Committee of UNHCR.

In many other areas of asylum law, courts of appeals have played a critical role in ensuring that legitimate refugees are not deported back to the countries where they would face political, religious and other forms of persecution. Courts have also helped to ensure that asylum law develops uniformly and in a manner that comports with the statute and with Congressional intent.[44]

Courts have overturned insufficiently reasoned denials.[45] They have vacated and remanded adverse credibility findings based on speculation, unsupported assumptions, and flawed reasoning.[46] They have vacated and remanded where IJs failed to assess evidence of past harm cumulatively and taking into account the particular characteristics of the victim.[47] The have made sure that the BIA considers the evidence before it, properly construes the applicant's claims, and does not stray from its own precedent without explanation.[48] Indeed, it was judicial criticism of the overall quality of Immigration

---

[44] *See, e.g., Negusie v. Holder* 129 S. Ct. 1159 (2009) (striking down agency holding that the "persecution" bar to asylum applies to individuals who assisted persecutors under duress); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (striking down agency application of "more likely than not" standard to asylum applicant, and holding that the proper standard, "well-founded fear," required a significantly lower showing).

[45] *See Benslimane v. Gonzales*, 430 F.3d 828, 833 (7th Cir. 2005); *Li v. U.S. Atty. Gen.*, 488 F.3d 1371, 1375 (11th Cir. 2007).

[46] *See Cao He Lin v. U.S. Dept. of Justice*, 428 F.3d 391 (2d Cir. 2005).

[47] *See Poradisova v. Gonzales*, 420 F.3d 70 (2d Cir. 2005).

[48] *See Shardar v. Attorney General of U.S.*, 503 F.3d 308, 315-17 (3d Cir. 2007); *Gebreeyesus v. Gonzales*, 482 F.3d 952, 955 (7th Cir. 2007); *Li*, 488 F.3d at 1375-76.

Court adjudication as having "fallen below the minimum standards of legal justice" that recently led to widespread internal review and reform goals in 2006.[49]

The same concerns that Courts of Appeals have raised generally about the asylum system apply to agency applications of the one-year deadline, many of which are dispositive of the applicant's protection claim. Judicial review of one-year-deadline determinations is necessary to ensure that IJs correctly apply the law and that the United States continues to protect those who come to this country seeking refuge from persecution.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the petition for the writ of certiorari should be granted.

---

[49] *Benslimane*, 430 F.3d at 830. *See also* Adam Liptak, *Courts Criticize Judges' Handling Of Asylum Cases*, N.Y. Times, Dec. 26, 2005, at A1; Department of Justice, Measures to Improve the Immigration Courts and the Board of Immigration Appeals, *available at* http://trac.syr.edu/immigration/reports/194/include/Gonzales22ImprovementMeasures.pdf (last visited Sept. 10, 2009). The Transactional Records Access Clearinghouse at Syracuse University (TRAC) has studied these reform proposals and concluded earlier this year that implementation as yet "has failed to achieve many of its ambitious purposes." *See* Immigration Courts: Still A Troubled Institution, *available at* http://trac.syr.edu/immigration/reports/210/ (last visited Sept. 4, 2009).

Respectfully submitted,

Alice Clapman
Center for Applied Legal Studies
Georgetown University Law Center
600 New Jersey Ave., NW, Suite 332
Washington, DC 20001
(202) 662-9751

Steven Schulman
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

September 14, 2009

APPENDIX

LIST OF AMICI CURIAE

The **Advocates for Human Rights** is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 800 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights provides *pro bono* legal assistance to indigent asylum seekers in the Upper Midwest. The Advocates for Human Rights has a strong interest in seeing that the United States construe legal protections for refugees and asylum seekers in a way that is consistent with international human rights standards and that does not leave actual victims of persecution outside its reach.

Founded in 1994 by a small group of concerned professionals, **Advocates for Survivors of Torture and Trauma** (ASTT) provides comprehensive mental health care and social services to survivors of torture and war trauma. ASTT is an independent, nonprofit organization whose mission is to alleviate the suffering of those who have experienced the trauma of torture, to educate the local, national, and world community about the needs of torture survivors, and to advocate on their behalf. ASTT's mental health services include psychological assessment, individual and family psychotherapy, and group treatment. In

appropriate cases, psychologists will conduct a full psychological evaluation for use as expert asylum court testimony. In addition, ASTT psychologists also help clients deal with the often intense emotional stress that accompanies the process of seeking asylum. ASTT is based in Baltimore and operate satellite offices in Washington, D.C. and Wheaton, MD.

Catholic Charities Immigration Legal Services was established in 1986 to provide professional immigration legal services to low-income, foreign-born individuals residing in the Washington, DC metropolitan area. A multi-lingual staff of attorneys and BIA-accredited representatives provides thousands of direct legal services on a variety of immigration matters each year, including asylum. Last year, Catholic Charities assisted 78 individuals with applications for asylum, affirmative and defensive, as well as referring additional individuals to our *pro bono* panel for assistance with their applications.

The **Center for Gender & Refugee Studies** (CGRS) has a direct and serious interest in the development of immigration and refugee law, including the issues under consideration. Founded in 1999 at the University of California, Hastings College of the Law, CGRS is the nation's leading organization supporting women asylum-seekers fleeing gender related harm, at both the practice and policy levels. Through its scholarship, expert consultations, advocacy, and appellate litigation, CGRS has played a central role in the development of refugee law and policy on a wide range of issues. Judicial review of

the one year bar – the central issue under consideration – implicates a matter of great consequence to CGRS. The Center has analyzed the impact of the one year bar in over 200 asylum cases and has published a journal article on the implementation of the bar.

The **Cornell University Law School Immigration Appellate Law and Advocacy Clinic** is one of the only law school clinics in the country that focuses exclusively on appellate immigration cases. Under the supervision of the Clinic Directors, law students represent immigrants fleeing persecution in their appeals before the Board of Immigration Appeals (BIA) and federal counts. Since the clinic's founding in 2003, approximately fifty law school students have worked on twenty-five cases. The Clinic has won nearly half the cases it has taken, which is a far greater rate of victory than most appeals before the BIA and the federal courts.

The **Harvard Immigration and Refugee Clinical Program** (HIRC) has worked with hundreds of immigrants and refugees since its founding in 1984. It combines representation of individual applicants for asylum and related relief with the development of theories and policy relating to asylum law. The U.S. Department of Justice and the Department of Homeland Security have engaged the HIRC in the training of immigration judges, asylum officers, and supervisors on issues related to asylum law. The HIRC published the first major treatise on U.S. asylum law, *Law of Asylum in the United States*. In addition, the HIRC provides advice, support, and supplemental services to advocates

around the United States. The HIRC has an interest in the proper application and development of U.S. asylum law, so that claims for asylum protection receive fair and proper consideration under existing standards of law. The HIRC regard the one-year filing deadline issue in this case as especially important, since it affects many of the clients the clinic represents.

The **Harvard Immigration and Refugee Clinic at Greater Boston Legal Services Greater Boston Legal Services** (GBLS) is New England's largest legal services organization. The Harvard Immigration and Refugee Clinic is a clinic based at Harvard Law School and at GBLS. The Women Refugees Project of the Harvard Law School Immigration and Refugee Clinical Program and Greater Boston Legal Services has worked with hundreds of women from around the world since its founding in 1992. It combines representation of individual women asylum applicants with the development of theories, policy and national advocacy. GBLS frequently works with clients who face one-year filing deadline issues, and has an interest in the proper application and development of U.S. asylum law so that claims for asylum protection receive fair and proper consideration under existing standards of law.

Since its founding in 1881, the central mission of the **Hebrew Immigrant Aid Society** (HIAS) has been to rescue Jews and others fleeing persecution and to assist them to start their lives anew in peace and security in the United States and elsewhere. In

fulfillment of this mission, HIAS maintained staff at Ellis Island to assist individuals through the immigration process, including representation in exclusion proceedings. More recently, HIAS attorneys and accredited representatives have provided legal representation to asylum seekers in Immigration Courts in the New York area, including at immigration detention facilities. HIAS has successfully represented numerous asylum seekers throughout the appellate process, up to and including the Federal Courts of Appeal. Through this experience HIAS has learned that there are many sound reasons – permitted within Congress' exceptions to the one-year deadline for applicants to apply for asylum after arriving in the United States – as to why individuals who would face persecution in their home country do not apply for asylum during their first year in the U.S. HIAS also understands how – in this and other aspects of pursuing asylum claims – it can take several layers of review before adjudicator error on this issue is effectively addressed. Therefore, HIAS believes it is crucial that individuals fleeing persecution have the opportunity for judicial oversight of exceptions to the one-year deadline to file for asylum.

Human Rights First has worked since 1978 to protect and promote fundamental human rights. Human Rights First grounds its refugee protection work in the standards set forth in the 1951 Refugee Convention, its 1967 Protocol, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy. Human Rights First (previously known as the Lawyers Committee for Human Rights) also

operates one of the largest *pro bono* asylum legal representation programs in the country, providing free legal representation to indigent refugees in partnership with volunteer attorneys at law firms. Many of these refugee clients have been affected by the asylum filing deadline.

In the **Immigrant Rights Clinic at the University of Baltimore School of Law** students, under the supervision of faculty, represent low-income immigrants in Immigration Court, in Maryland District Court, and before the Department of Homeland Security U.S. Citizenship and Immigration Services. Students' caseloads are diverse, touching on many areas of immigration practice, including asylum law. Clients in the Immigrant Rights Clinic come from all over the world, including Africa, Asia, Europe, and Central and Latin America.

Immigration Equality is a national organization that works to end discrimination in U.S. immigration law, to reduce the negative impact of that law on the lives of lesbian, gay, bisexual, transgender (LGBT) and HIV-positive people, and to help obtain asylum for those persecuted in their home country based on their sexual orientation, transgender identity or HIV-status. Immigration Equality also runs a *pro bono* asylum program and provides technical assistance and advice to hundreds of attorneys nation-wide on sexual orientation, transgender and HIV- based asylum matters. Immigration Equality has provided trainings to asylum officers on asylum cases based on sexual

minority and HIV status and has co-authored the leading manual on preparing sexual orientation-based asylum claims.

The **Immigration Law Clinic of the Rogers College of Law, University of Arizona** provides students with the opportunity to gain hands-on experience with immigration law by providing services to immigrants in Southern Arizona. Its clients include asylum seekers detained in Eloy, Arizona, whom students, under attorney supervision, represent in removal proceedings. The Clinic has represented immigrants from countries including Vietnam, Libya, El Salvador, Guatemala, Cuba, Nepal, Thailand, Iraq, Syria, Cambodia, Laos, Korea, the Sudan, Uganda and Haiti. Students in the Clinic also provide advice and pro se assistance to non-detained respondents in removal proceedings, including asylum seekers. Such assistance, at times, includes completion of asylum applications. The one-year asylum application deadline and the exceptions thereto feature prominently among the issues the Clinic and its clients must confront in preparing and litigating their cases.

Jubilee Campaign USA is a Non Governmental Organization (NGO) that promotes human rights and religious liberties for ethnic and religious minorities throughout the world. Jubilee has been granted Consultative Status by the United Nations (UN) and participates annually in the United Nations Human Rights Caucus Session in Geneva, Switzerland, raising concerns of persecuted religious minorities and others from various parts of the world. Jubilee

undertakes advocacy and representation of refugee cases, particularly those fleeing religious based persecution.

The **Pennsylvania Immigration Resource Center** (PIRC) is a non-profit legal services organization founded in 1996. Located less than a mile from York County Prison, PIRC has become the leading source of legal services to immigrants detained by DHS in Pennsylvania. PIRC focuses on providing services to the most vulnerable immigrants in detention. Through the Detained Torture Survivors Project, PIRC provides direct legal assistance to detained torture survivors appearing before the Immigration Courts and federal courts of appeal in complex cases involving Convention Against Torture, Asylum, Cancellation of Removal, and Withholding of Removal claims.

Physicians for Human Rights (PHR) was founded in 1986 on the idea that health professionals, with their specialized skills, ethical duties, and credible voices, are uniquely positioned to investigate the health consequences of human rights violations and work to stop them. PHR mobilizes health professionals to advance health, dignity, and justice and promotes the right to health for all. The members of PHR's Asylum Network assist asylum seekers by conducting mental and physical evaluations to document the forensic evidence of abuse. Our clinicians also use their expertise to educate their colleagues and to inform public policy affecting refugees and asylum seekers. PHR is headquartered in Cambridge, Massachusetts, and maintains an

office in Washington, DC. It is a non-profit, non-sectarian organization funded through private foundations and by individual donors.

Public Counsel is the largest *pro bono* public interest law firm in the world. Founded in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to the most vulnerable members of our community. The Immigrants' Rights Project (IPR) provides legal representation to individuals seeking asylum in the United States based on past persecution or a well-founded fear of future persecution on account of political opinion, race, religion, nationality, or membership in a particular social group. IRP represents clients from all over the world for whom the U.S. is the last place of refuge and where return to their home country may mean death or torture. Depending on the procedural posture of a case, asylum applicants are provided representation in administrative trials before Immigration Judges, on appeal before the Board of Immigration Appeals, and before the U.S. Court of Appeals for the Ninth Circuit. In some cases, representation is provided in non-adversarial proceedings before the Department of Homeland Security.

Located in Falls Church, VA, and Houston, TX, the **Tahirih Justice Center** (Tahirih) is a non-profit organization offering free legal services to women and girls fleeing violent human rights abuses such as female genital mutilation, torture, rape, human trafficking, honor crimes, forced marriage, and

domestic violence. Since 1997, through direct services and referrals, Tahirih has assisted almost 10,000 women and children. Tahirih has represented clients in more than ninety gender-based asylum cases before the U.S. Citizenship and Immigration Services (USCIS) Asylum Office, the U.S. Immigration Courts of Arlington and Baltimore, the Board of Immigration Appeals (Board) and the U.S. Courts of Appeals. Building on the landmark case *Matter of Kasinga*, Tahirih is at the forefront of organizations using the refugee definition and the asylum process to protect women and girls fleeing gender-based persecution. In addition to direct services, Tahirih also engages in national public policy advocacy, working to pass laws, develop regulations, transform policies, and establish precedent so that systemic change will ensure the long-term protection of women and girls from violence. Many of Tahirih's asylum clients have been adversely impacted by the one-year filing deadline.

Additionally, the following law professors have joined as *amici* in their individual capacities as educators, clinical directors, researchers, authors and experts in asylum law and policy:

Deborah Anker
Clinical Professor of Law; Director, Harvard Immigration and Refugee Clinical Program
Harvard Law School*

Stacy Caplow
Professor of Law; Director, Clinical Education Program

Brooklyn Law School*

Michael J. Churgin
Raybourne Thompson Centennial Professor
University of Texas School of Law*

Alice Clapman
Clinical Teaching Fellow, Center for Applied Legal Studies
Georgetown Law*

Regina Germain
Adjunct Professor of Law
University of Denver, Sturm College of Law*

Denise Gilman
Clinical Professor of Law, Immigration Clinic
University of Texas School of Law*

Anjum Gupta
Clinical Teaching Fellow, Center for Applied Legal Studies
Georgetown Law*

Dina Francesca Haynes
Associate Professor of Law; Director, Immigration Project
New England Law*

Harvey Kaplan
Adjunct Professor of Law

Northeastern School of Law*

Nancy Kelly
Clinical Instructor; Co-Managing Director, Harvard Immigration and Refugee Clinic at Greater Boston Legal Services
Harvard Law School*

Beth Lyon
Associate Professor of Law
Villanova University School of Law*

Elizabeth McCormick
Associate Clinical Professor of Law; Director, Immigrant Rights Project
University of Tulsa College of Law*

Nancy Morawetz
Professor of Clinical Law
New York University School of Law*

Hiroshi Motomura
Professor of Law
UCLA School of Law*

Rachel E. Rosenbloom
Assistant Professor of Law
Northeastern University School of Law*

Andrew Schoenholtz

Visiting Professor of Law; Deputy Director, Institute for the Study of International Migration
Georgetown University*

Philip G. Schrag
Professor of Law
Georgetown University*

Deborah S. Smith
Adjunct Professor of Law
University of Montana School of Law*

Gemma Solimene
Clinical Associate Professor of Law
Fordham University School of Law*

Shoba Sivaprasad Wadhia
Clinical Professor of Law; Director, Center for Immigrants' Rights
Penn State Dickinson School of Law*

John Willshire-Carrera
Clinical Instructor; Co-Managing Director, Harvard Immigration and Refugee Clinic at Greater Boston Legal Services
Harvard Law School*

*affiliation provided for identification purposes only